Supreme Court, U.S.
FILED

03 1 1 7 0 FEB 10 2004

No.

In The

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

V.

AMADA AMERICA
INCORPORATED,

Respondent..

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether in a product liability case a .Ph.D. mechanical engineer with over twenty years experience as a professor and researcher in the fields of machine design and safety, who has programmed press brakes to operate by computer numerical control must have actually designed a safety device(s) commonly used in the industry, which is recognized and required by OSHA regulations and American National Standards Institute Standards; and marketed by nearly every manufacturer of power press brakes, in order to be considered qualified to render an opinion as to the feasibility of installing such a devise(s) on the power operated press brake at issue.

Whether recognition by the American National Standards Institute, and The Occupational Health and Safety Administration, production and sale by virtually every manufacturer of power press brakes, testimony by defendant's employees of common usage of a safety device on press brakes sold by the defendant, and identification by the defendant's retained expert of safety devices recommended by the plaintiff's expert as methods of guarding that could be used on the press brake at issue, in a product liability /design defect case constitutes "general acceptance " pursuant to this Court's rulings in *Dauber v. Merrell Dow Pharmaceuticals, Inc,. 509 U.S. 579, 113 S. Ct.. 2786, (1993) and Kuhmo Tire Ltd. v. Carmichael 526 U.S. 137, 119 S. Ct. 1167 (1999)*

Whether in the absence of expert design testimony the testimony of plaintiff's safety expert, Miranda Savage, Ph.D., stating that due to the fact that the maintenance operation plaintiff was performing at the time of his injury had to be performed while the press brake was energized, in violation of Occupational Safety and Health Administration (OSHA) Standard 1910.147 (a) 147.10, caused an unreasonably dangerous condition to exist with regard to a normal maintenance procedure, coupled with evidence of OSHA regulations and American National Standards Institute (ANSI) standards, which recognize and require forms of machine guarding as identified by plaintiff's expert design witness,, along with the testimony of defendant's employees and retained expert design witness raise sufficient factual questions to allow a jury to find that the machine in question was unreasonably dangerous to preclude the entry of summary judgment for defendant .

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CITATIONS OF OPINIONS AND ORDERS

ENTERED

United States District Court for the Eastern District of

Missouri No. 4:02CV1767CDP

United States Court of Appeals for the Eighth Circuit

No.. 03-1388 UNPUBLISHED

JURISDICTIONAL STATEMENT

(a) This Court's jurisdiction is invoked pursuant to United States Supreme Court Rule 10 (a) United States Court of Appeals has entered a decision which conflicts with the decisions of more than one other United States Court of Appeals on the same important matter.

A United States Court of Appeals has sanctioned a decision by a lower court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

(b) The decision of the United States Court of Appeals for the Eighth Circuit was entered September 18, 2003.

(c) A timely Petition for Rehearing with Petition for Rehearing en banc was filed on October 02, 2003

(d) the Petition for Rehearing with Petition for Rehearing En Banc was denied on November 12, 2003

(e) An Answer to the Petition for Rehearing with Rehearing en banc was requested on October 14, 2003

(f) The District Court had jurisdiction pursuant to 28 United States Code 1332 (1) .

Plaintiff, Donald Shaffer was a citizen of the State of Illinois, at time of filing.

Defendant is a corporation organized under the laws of the State of Washington.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill , training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Civil Procedure 402

All relevant evidence is admissible, except as

otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to

statutory authority. Evidence which is not relevant is not admissible.

OSHA standard 29 CFR Subpart "O"

1910.212 (a) (1)

" *Types of guarding. One or more methods of machine guarding shall be provided to protect the operator* ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods are barrier guards, two hand tripping devices, electronic devices etc.*

OSHA Standard 29 CFR 1910.212 (a) (3) (ii)

"The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

OSHA standard 29 CFR 1910.147 (a) (iii)

Purpose :

This section requires employers

to establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices, and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of stored energy in order to prevent injury to employees.

OSHA Standard 1910.147 App. A

Typical minimum lockout procedures:

(4) De-activate the energy isolating device(s) so that the machine or equipment is isolated from the energy source(s).

STATEMENT OF THE CASE

This cause arises out on an industrial related injury that occurred on March 01, 2000 at the Newco manufacturing facility in St. Charles Missouri. The plaintiff, Donald Shaffer, suffered a crush injury to his right hand, resulting in multiple digit amputations. Mr. Shaffer's hand was caught between the lower beam and the die on an Amada 5020 LD up acting press brake. The point where the lower beam and die meet is the "point of operation," the point at which metal is bent. Newco uses the press brake at issue to bend sheet metal for fabrication of automatic coffee makers.

At the time of his injury Mr. Shaffer was employed as a Service Engineer by Amada Engineering and Service Company. Mr. Shaffer was attempting to correct a problem with the lower beam at the time of injury. The lower beam, which rises to bend the metal between the beam and the die, was supposed to be adjusted so that it could only open far enough to allow a piece of sheet metal to be inserted between the beam and the die. The beam was opening approximately 4 inches at the time of the injury. The press brake was closed for use by Newco employees as it was considered unreasonably dangerous to operate the machine in the condition.

Mr. Shaffer brought an action based on strict product liability in the United States District Court for the Eastern District of Missouri against Amada America, Inc., importer and seller of the press brake in question.

Mr. Shaffer alleged that the press brake in question was unreasonably dangerous due to design and manufacturing defects, including, but not limited to:

(1) lack of machine guarding, specifically either a mechanical guard to prevent the operator's hand from entering the space between the up acting beam and the press dies, or a light curtain that would deactivate the machine in the event that the operator's hand entered the space between the beam and the die; known as the "point of operation.," or the "die space" the place where the metal is actually bent. (2) Mr. Shaffer also alleged that the design of the machine posed an unreasonable risk that a person attempting to adjust the bottom position of the lower beam; as he was doing, would lose his or her balance while standing on one foot and operating the treadle bar which activates the lower beam with the other foot; while standing directly in front of the machine; causing the person to either fall into the machine or grab the edge of the machine to regain balance. As the machine was not equipped with any type of guard, Mr. Shaffer alleged an unreasonable risk that the worker's hand would enter the die space and be crushed. Mr. Shaffer tendered Professor Amirouche, Ph.D. as an expert design witness.

Professor Amirouche testified, inter alia, that the press brake should have been equipped with mechanical guards which would have prevented the operator's hand from entering the "'point of operation" or sensory electronic devices (commonly used in the industry, called "light curtains," and in fact sold by the defendant as safety devices for the press brakes sold by defendant) which would have instantly

stopped the machine in the event that the operator's hand entered the point of operation.

The District Court, without holding a Daubert hearing, granted Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouche. The District Court based its decision in part on the fact that Professor Amirouche had not designed a press brake, nor had he worked for a company that manufactured press brakes. Professor Amirouche had not personally designed the guards he recommended. He testified that such forms of guarding are commonplace. He is an expert in the field of electronic sensors, and in his experience such devices can be readily adapted to all types of machinery. He further testified that while he had not designed a mechanical guard for the machine at issue, he could do so if requested.

The District Court held that the expert testimony of plaintiff's tendered safety expert, Professor Maranda Savage, Ph. D., without Professor Amirouche's testimony, was not sufficient to establish a question of material fact. Dr. Savage testified that the necessity to service the machine while it was energized caused an unreasonably dangerous condition , and was in violation of Occupational Health and Safety Administration (OSHA) Standard 29 CFR 1910.147 which requires the machine to be isolated from the energy source and rendered inoperative while service is performed. The District Court did not comment on the testimony of Amada's retained expert who identified the forms of guarding recommended by Professor Amirouche as types of guarding which could be used on the press brake at issue. The District

Court did not comment on the testimony of Amada employees who stated that they had installed numerous light curtains on Amada press brakes and saw no reason why such devices would not work on the machine in question.

The District Court Granted Defendant's Motion for Summary Judgment. Plaintiff filed a timely Notice of Appeal.

REASONS TO ALLOW THE WRIT

THE UNITED STATES COURT OF APPEALS HAS SANCTIONED A DECISION OF THE DISTRICT COURT WHICH SO FAR STRAYS FROM THE STANDARDS SET FORTH FOR BY THIS COURT FOR ADMISSION OF EXPERT TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 702 AS TO CALL FOR THIS COURT TO EXERCISE ITS SUPERVISORY AUTHORITY

> The inquiry envisioned by Rule 702 is we emphasize, a flexible one. Its overreaching subject is the scientific validity and thus the evidentiary relevance and reliability --of the principles that underlie a proposed submission. The focus, of course, must be solely on the principles and methodology , **not on the conclusions that they generate.** (emphasis added) *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, .*

594, 125 L. Ed. 2d 469, 484, 113 S. Court 2786, 2797, (1993)

See also Kuhmo Tire Ltd. v. Carmichael 526 U.S. 137, 119 S. Ct. 1167, (1999)

Daubert factors to be considered in making a determination as to whether to accept or reject expert testimony are neither definitive or exhaustive, but rather flexible to account for the various types of potentially appropriate expert testimony.

Professor Amirouche' s educational and practical experience qualify as " specialized knowledge " gained through experience, education, or training under Federal Rule of Evidence 702, and his testimony was improperly excluded; his alleged shortcomings went to the issue of weight rather than admissibility *McCullock v. H.B. Fuller Company 61 F. 3d 1038 (2d Cir. 1995) Daubert V. Dow Merrrell Pharmaceuticals Inc., 509 U.S. 579, 113 S. Ct. 2786, 2789, 125 L. Ed. 2d 469(1993).*

In the case at bar the District Court, while paying lip service to *Daubert,* focused on the expert's conclusion.

The Court stated that Dr. Amirouche

> "has no knowledge as to whether any of his proposals would work or would interfere with the normal operation of the press brake."

> " It is not the trial court's role to decide whether an expert's opinion is correct.

> The trial judge is limited to determining whether the expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound." *Deputy v. Lehman Brothers, Inc. 345 F. 3d 494, 506 (7th Cir. 2003)*

A DISTRICT COURT ABUSES ITS DISCRETION IF ITS CONCLUSION IS GUIDED BY ERRONEOUS LEGAL PRINCIPLES

Koon v. United States, 518 U. S 81, 100, 135 L. Ed 2d 392, 116 S. Ct. 2035 (1996)

OR RESTS UPON A CLEARLY ERRONEOUS FACTUAL FINDING

United State v. Barber 119 F. 3d 276, 283, (4th Cir. en banc) cert. denied 522 U.S. 988, 139 L. Ed. 391, 118 S. Ct. 457 (1997)

As will be set forth later in this Petition, the record indicates that the District Court based the above conclusion on erroneous findings of fact.

The District Court erroneously labeled Professor Amirouche's opinions as "abstract theory," his research as "almost exclusively documents he gathered from the Internet solely for the purpose of this litigation." The District Court states that the only literature he consulted with regard to the press brake at issue is the Amada manuals. One might ask what other literature would be relevant.to the particular model at issue.

FURTHER, EVEN IF THE DISTRICT COURT APPLIES THE CORRECT LEGAL PRINCIPLES TO ADEQUATELY SUPPORTED FACTS, THE DISCRETION OF THE TRIAL COURT IS NOT BOUNDLESS AND SUBJECT TO AUTOMATIC AFFIRMANCE

Westberry v. Gislaved Gummi AB, and Mataki Kemi AB 178 F. 3d 257, 261, (4th Ccir. 1999)

> "As the Supreme Court reminds us, it is the hallmark of our review, absent abdicating our duty , to analyze the trial court's ruling in the light of the principles of *Daubert* and the Federal Rules of Evidence." *Lauzon v. Senco Products Inc. 270 F. 3d 681, 685, 686 (8th Cir. 2001)*

Counsel respectfully submits that the United States Court of Appeals for the Eighth Circuit abdicated its duty and simply rubber stamped the Trial Court's erroneous decision in the instant case..

The case law relied upon by the District Court is in every respect inapposite to the facts of the case at bar.

In *Jarequei v. Carter Manufacturing Co. Inc., 173, F. 3d 1076 (8th Cir. 1999).* The proffered expert attempted to testify that the corn head on a combine was defective because it lacked "awareness barriers " that warned of the hazard zone where the gathering chains of the combine emerged from the snout of the machine. The "expert" claimed the gathering chains were invisible ... "because of the speed at which the gathering chains suddenly emerge from under the snout ....." **Willis admitted, however, that he had never observed the corn head at issue when it was**

running, and that he had never seen the any corn head in operation excrpt from the roadside during his various trips through the Illinois countryside. "He stated " I guess as engineer I know what it looks like in the running mode." He knew of no manufacturer of corn heads which had ever put an awareness barrier in front of the gathering chains. (emphasis added) *Jarequi* 173 F. 3d 1076, 1080. Nor did he point to any manufacturer which incorporates awareness barriers into any similar farming machinery. *Jarequi 173 F. 3d 1076, 1084* There was no evidence to suggest general acceptance of his theory.

In *Dancy V. Hyster Company 127 F. 3d 649, (8th cir. 1997)* the proposed expert was a mechanical engineer with a specialty in the field of thermal science. He had never seen a guard such as he proposed on a fork truck or any similar kind of equipment. He simply "envisioned such a guard." He stated that: I will probably do some thinking about design after today." There was no evidence of general acceptance of his ideas.

n *Sandage V. Bankhead Enterprises 177 F. 3d 670, (8th Cir. 1999)* the Court held that the modifications to the trailer were open and obvious. ... Any ordinary and reasonable person could easily see that the car door was blocked and there was not enough room to exit safely.

Linegar V. Armour of America 909 F. 2d 1150 (8th Cir. 1990) involved a bullet resistant vest. A Missouri state trooper was killed when several bullets entered his body at an unprotected area. The Court

ruled that no defect in the vest caused Linegar's injuries. (909 F. 2d at 1154.)

In contrast, Missouri law recognizes that a failure to provide a safety device on a machine can render the machine unreasonably dangerous.

THE DECISION OF THE UNITED STATES COURT OF APPEALS CONFLICTS WITH SEVERAL PUBLISHED DECISIONS OF OTHER CIRCUITS INVOLVING AN IMPORTANT FEDERAL QUESTION

An expert is not required to have direct design experience with the product at issue *Stagl v. Delta Airlines 117 F. 3d 76 (2d Cir. 1997) DaSilva etc. et al V. American Brands, Inc. 854 F. 2d 356 (1st Cir. 1988)*

An expert is not required to perform tests in any given situation *Clark v. Chrysler Corporation 31 F. 3d 461, 466, (6th Cir. 2002)*

> "Where an expert testifies based upon an application of established engineering techniques failure to submit those techniques to publication establishes nothing about their reliability. If an expert's testimony is based upon extensive practical experience rather than novel methodology subject to publication

failure to publish does not cast doubt on the reliability of his analytical technique."
Smith v. Ford Motor Company 215 F. 3d 713, (7th Cir. 2000)

"The failure to provide a necessary device or the failure to warn potential users about a product' s dangerous propensities can render a product unreasonably dangerous." *Romero v. Cincinnati Incorporated171 F.3d 1091, 1094 (7th Cir. 1999) citing Monreal V. Waterbury -Farrel Foundry & Machine Company, 269 Ill. App. 3d 841, 646 N.E. 2d. 1337, 207 Ill. Dec. 250 (1st. Dist. 1995).*

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONFLICTS WITH SEVERAL PUBLISHED DECISIONS ENTERED BY THE EIGHTH CIRCUIT

Professor Amirouche stated, inter alia:

1. The treadle bar is dangerous and unreliable. It is haphazardly controlled and provides a dangerous mechanism for foot support.

2. If a foot electric/pneumatic switch had been in use Mr. Shaffer wouldn't have had his fingers crushed and would still have his hand today.

3. Furthermore, the press brake should have built-in safety guards of a mechanical/sensory nature that would prevent such accidents from occurring. This is especially true when repairs are being performed on the machine.

These are very common methodologies and procedures that could be adapted to a lot of machines and I have no reason to say why it shouldn't be --that it shouldn't work with that particular model.... (Amirouche dep. p. 235 Record Appendix p.11)

In *Clark V. Chrysler 310 F. 3d 461, 466 , (6th Cir. 2002)* The Court held : Daubert does not require an expert to actually come in and perform tests in every situation.

> "As a general rule the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross examination
>
> *Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded. " Smith V. BMW North America Inc., BMW AG, and Roadshow Enterprises doing business as Roadshow BMW, Inc., 308 F. 3d 913, 921 (8th Cir. 2002.)*

His opinion was based in part on materials he reviewed prior to writing his Report and partly on "my knowledge of being able to adapt sensors to a number of mechanical systems, and that's what I do. " He relied on his experience of more than twenty years as a professor and researcher in the fields of design

and safety. For approximately 18 years he has taught classes "almost yearly" where students design components, "things that will be done by either a press brake machine or other machine that is manually or mechanically operated. And what I mean by that is essentially the students will be creating, if you wish, the design of the die and then doing the analysis on the required forces or required operation to actually achieve that. He is the author of two editions of a book entitled COMPUTER AIDED DESIGN AND MANUFACTURING, as well as other books on design and safety. He served on the steering committee for the National Institute of Health and Safety, (NIOSH) to address ergonomics factors and safety in relation to the interaction of operator and machine in 1999 . The committee studied all interaction between people and machines, There were presentations daily with flow charts and discussions of every single item, including press brakes.

A partial list of materials reviewed includes:

1. Shaffer's own statement of the accident;

2) OSHA Press Release Aims to Reduce Power Press Injuries;

3) Safety Lines essentials; brake presses ;

4) Amada operating manuals;

5) Medical Records ;

6) Hand photographs;

7) Pictures of the press brake taken by a professional photographer;

8) A video of the press brake taken at the scene of the accident.

9) Amada Engineering Electric pneumatic foot switch.

Professor Amirouche reviewed a large body of professional journals, books, conference proceedings, websites, government agencies, and international and national organizations with websites and data bases on injuries caused by press brakes at work. The data bases that he searched are those that would deal with any injuries resulting from fingers/hand being crushed by a brake press. Professor Amirouche witnessed the operation of the press brake at issue by a Newco employee. He inspected the press brake and took measurements. He studied the operator's manual and the parts list. He saw the reenactment of the plaintiff's injury. He has particular expertise, through independent research, with adapting electrical sensors to a variety of machines.

Robert Bellamy, Senior Service Engineer for Amada America, Inc., described a "programmable light curtain" as a safety device which is installed on a press brake.

> "You teach the curtain how many lights have to be out in each form up to --some curtains will allow you 13 forms some will allow 16 forms. And when you program a light curtain, you break so many lights as your sheet goes up being formed. And it has to happen that way every time on that particular station. And if it doesn't then the light curtain will stop, the beam will stop the machine

because it would be the same as putting your arm in break lights that weren't broke before and not supposed to be broke, it stops you at that point." (Bellamy deposition pp. 36, 37)

Q. Do you know any reason why-- if Newco decided to put a light curtain on that 5020 do you know of any reason why the light curtain would interfere with Newco's operations, the ones that you have observed?
A. From what I have seen I don't think so but I have not seen everything. (Bellamy deposition p 37) Bellamy testified that he had installed more than 20 light curtains on Amada press brakes from the year 1996 until the date of his deposition, in 2002. (Robert Bellamy Deposition p. 27)

In *DaSilva etc. et al, v. American Brands Inc., and USM Corporation , USM Corporation v. American Brands, Inc. (1st Cir. 1988)* a wrongful death action alleging negligence and breach of warranty, in which the plaintiff's decedent was killed while operating a Banbury mixer at an industrial plant, a mechanical engineer with no design experience with the mixer model in question was allowed to testify over defendant's objection. His only experience with the machine in question was briefly as a production line supervisor.

The Court stated "Appellant, in essence, is arguing that we should constrain a trial court to admit testimony only from

> mechanical engineers who have had design experience with the specific machine in question, such an approach would often mean that the only experts who could testify regarding a machine are those who have ann interest in defending its design. We are not persuaded to abandon the general rule that a court should consider all relevant qualifications when ruling on the admissibility of expert testimony.

The Court allowed the testimony based upon the witness's experience as an engineer. He was familiar with fundamental engineering principles, *DaSilva 845 F. 3d 356, 361. (emphasis added)*

In *Stagl V. Delta Airlines Inc. 117 F. 3d 76 (2d Cir. 1997),* the plaintiff alleged that the airline negligently failed to take any measures to control the crowd at the baggage carousel or to provide a means by which elderly and disabled people could retrieve their luggage safely. The Circuit Court held that the trial court abused its discretion by ruling that plaintiff's expert was not qualified to testify about the safety of the carousel area because he did not have experience in airline terminal or baggage claim area design. The Court further reversed an order granting defendant judgment as a matter of law. The plaintiff's expert, Fischer, had an undergraduate degree from Manhattan College and a Master of Science from Columbia University, both in mechanical engineering.

He had worked as a licensed engineer in New York for approximately twenty years. The Court found that the primary basis for the trial court's determination that his testimony would not be allowed concerned whether Fischer had expertise in airline terminal or baggage claim design. Fischer admitted that he did not but testified credibly that his field of expertise was in the interaction of machines and people. The interaction between the machine and passengers was at issue. The Court held that to allow only the testimony of experts who had experience in the design of airline baggage systems came dangerously close to allowing the airlines to set their own standards. *Stagl V. Delta Airlines Inc. 117 F. 3d 76, 82 (2d Cir. 1997*

In the instant case the interaction between operator and machine is an important issue.

Professor Amirouche is a highly qualified expert in the fields of machine design and safety. In formulating his opinions in this case he relied on his experience of more than twenty years as a professor and researcher in the area of machine design. His particular expertise in biomechanics, ergonomics , and the adaptation of electrical sensors to all types of machinery make him uniquely qualified to formulate an opinion as to the cause of Mr. Shaffer's injury; and the forms of guarding necessary to prevent such injury.

Professor Amirouche has programmed machines, including press brakes, to operate by computer numerical control, and has published books dealing with CNC. He personally designed a robotic system to remove nuclear waste at the Argonne National Laboratory.

"That an expert testifies based on research he has conducted independent of litigation provides important, objective proof that the research comports with the dictates of "good science." An expert's finding that flows from research independent of litigation is less likely to be biased and the expert is limited to "the degree to which he can tailor his testimony to serve a party's interests." (*Lauzon V. Senco Products Inc. 270 F. 3d 681, 692 (8th Cir. 2001 Internal citations omitted)*

Professor Amirouche applied recognized engineering principals to his analysis of the events leading to the injury; as well as the steps that could have been taken to prevent the injury.

The Court in *Smith v. Ford Motor Company 215 F. 3d 713, (7th Cir. 2000)* reversed an erroneous finding by the district court that two experts were not qualified. The district court failed to consider more than one factor in the reliability of the testimony. The Appellate Court held:

> " If Muszar was merely applying well-established engineering techniques to the particular materials at issue in this case then his failure to submit those techniques to peer review establishes nothing about their reliability. Similarly, if Cassassa's accident reconstruction methodology is based on his extensive practical experience in this area, rather than novel methodology subject to publication, his failure to publish does not cast doubt on the reliability of his analytical technique."

> *Bonner v. Crawford and Company 259 F. 3d 924, 928 (8th Cir. 2001)* held "even if the judge believes there are better grounds for some alternative conclusion and that there are some flaws in the scientist's methods, if there are good grounds for the expert's conclusion, it should be admitted." Neither *Rule 702 or Daubert* requires that an expert opinion resolve an ultimate issue of fact to a scientific absolute in order to be admissible."

Professor Amirouche carefully utilized a "differential diagnosis" method to rule out all alternative possibilities of the cause of injury. His opinions on machine guarding enjoy universal acceptance by OSHA , the American National Standards Institute. (ANSI); the press brake industry; and the United States Court of Appeals for the Eight Circuit. *Murphy V. L & J Press Company 558 F. 2d 407, 410, 411, (8th Cir. 1977)* .

> "It is well settled law in Missouri that failure to provide a safety factor in a machine's design, (here a point of operation guard or some other protective device) can constitute a "defective condition" ..... It is clear that Murphy's use of the 1948 and 1960 ANSI and OSHA codes was to illustrate the fact of the availability of point of operation guards at the time the press was manufactured in 1960. .....the use of these standards for this limited purpose is clearly admissible under

> Rule 402 of the Federal Rules of Evidence, as it relates directly to the feasibility question, i.e. could L&J have feasibly included some form of protective device on the press. *Murphy V. L& J Press Corporation,* 558 F. 2d 407, 410, 411, (1977)

Murphy reversed a jury verdict for the defendant, and remanded for new trial on the grounds that OSHA and ANSI standards had been used to argue the question of who had the duty to guard, rather than the question of the unreasonably dangerous condition of the machine. .The Court rejected defendant's argument that the standards reflected a consensus of opinion supporting their "design alternative" of leaving the guarding to the user or purchaser. The Court found such argument had the

> " most tenuous, if any relevance to the question of feasibility, and even if arguably relevant, introduction of these materials was far more prejudicial than probative, and the materials should have been excluded on that grounds." M*urphy* at 558 F. 2d 411.

U.S. Department of Labor Occupational Safety and Health Administration Press Release: **OSHA Aims to Reduce Power Press Injuries [03/05/1997]** (Plaintiff's Exhibit Appendix pp. 18, 19)) One of the documents reviewed by Professor Amirouche states:.

> " It is unconscionable for workers to be losing their fingers and suffering other disabling injuries simply because mechanical power presses are not properly guarded or maintained," said Greg Watchman, acting

assistant secretary of labor for occupational safety and health. "operating a mechanical power press can be extremely dangerous. Yet injuries are preventable when employers ensure that guards, which have long been required and are readily available are installed and maintained on presses to protect workers against the punching action of metal stamping equipment." (Amirouche Report Exhibit Appendix pp. 1-5)

OSHA standard 29 CFR Subpart "O" 1910.212 (a) (1) states:
Types of guarding: One or more method of machine guarding shall be provided to protect the operator ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods are barrier guards, two hand tripping devices, electronic devices etc.*

OSHA Standard 1910.212 (a) (3) (ii) provides: "*The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle." (Record* Exhibit Appendix 20-22)

The American National Standards Institute Standard B 11.3 1982 states the employer shall provide safeguarding at the point of operation by (a) A point of operation guard or a point of operation device. (Appendix of Record p. 81)

The defendant offers programmable light curtains for sale, stating :"now safety does not have to come at the expense of productivity. " (Record Exhibit Appendix p. 47) Additionally the defense expert, Peter Schwalje, admits that programmable light curtains are offered by several press brake manufacturers as optional equipment. (Schwalje deposition p. 97 Record Exhibit Appendix p. 157)

Peter J. Schwalje, defendant's proffered design expert; testified as follows

Q. Can you set forth for me what types of safeguards might have applicability to this machine?

A. It is --in some instances one could use a barrier guard that is fixed; one can use die guards that are fixed to the dies. You could use fixtures which introduce and remove the material without the operator having to hold the piece while the inserting is going on or the removal. You can use restraint devices which limit the forward motion of the operator's hands. You could use a pull back mechanism working off an overhead mechanism to force the operator's hands back from the point of operation. You could use forms of presence sensing devices such as photoelectric or--

well, we're getting away from RF radio frequency devises.

Q. A presence sensing device, is that something that is commonly called a light curtain?

A. That's a generic name, yes.

Q. How does it work?

A. It establishes an energy beam, which is in a spectrum normally away from visible light or incandescent light, and establishes in essence a field which projects across the front portion of the machine. The field will sense an interruption. It will send a signal to a control device and that will inhibit motion. (Schwalje deposition pp. 78, 79).

Mr. Schwaljge also testified that in the year 2000 Amada offered foot control devices as an alternative to treadle bars for activation of Amada press brakes. (Dep. p 93)

EVEN IF THE TESTIMONY OF PLAINTIFF'S DESIGN EXPERT, FARID AMIROUCHE WAS PROPERLY EXCLUDED PLAINTIFF COULD ESTABLISH SUFFICENT QUESTIONS OF MATERIAL FACT TO WITHSTAND A MOTION FOR SUMMARY JUDGMENT

Duke v. Gulf and Western Manufacturing 660 S.W.2d 404 , 416 (Mo. CA , S.D.) held that federal regulations (OSHA 1910.212 (c) (d) or Missouri

Statutes imposing a duty on the employer to safeguard machines did not excuse the manufacturer from the duty to safeguard.

See also *Murphy v. L&J Press Company 558 F. 2d 407, 411, (8th Cir. 1977)*

By the introduction of OSHA and ANSI standards as set forth above as well as the testimony of America, Inc., employees, Robert Bellamy and Themis Alexopoulos and. Peter Schwalje, Amada's expert; plaintiff easily establishes a question of fact as to the unreasonably dangerous condition of the machine, as well as the feasibility of guarding the machine in question. Plaintiff's safety expert, Miranda Savage, Ph. D.; testified that the necessity to service the machine while it was energized caused an unreasonably dangerous condition , and was in violation of Occupational Health and Safety Administration (OSHA) Standard 29 CFR 1910.147 which requires that a machine be isolated from the power source when repairs are performed.

While it is true, as the District Court stated, that Dr. Savage testified the machine meets applicable standards, this is a moot point. ANSI Standard B11.3 1982, the only applicable standard, requires that the **employer, not he manufacturer, provide safeguards.** The machine meets the applicable standards of the industry without guards. As pointed ort above, Missouri law does not excuse the manufacturer simply because the press brake met this standard. *Murphy at 411, Duke at* 415, 416, citing *Gordon v. Niagra Machine and Tool Works 574 F. 2d 1182 (5th Cir. 1978Rios v. Niagra Machine and /tool Works 59 Ill. 32d 79, 319 N.E. 2d 232 (1974).*

In *Padillas V. Stork -Gamco Inc. 186 F. 3d*

412, 416 (3rd Cir. 1999) The Court held that at the summary judgment stage, it is premature to rule out the possibility that expert testimony will be unnecessary to establish a question of fact to submit to the jury. Non expert testimony and pictures may allow the jury to understand the construction and use of the machine; if so expert testimony would not be required. The Court held that based on the record the Court could not exclude the possibility that plaintiff's non expert testimony establish a question of fact for the jury to resolve.

In Padillas, as in the instant case, the District Court stated , without explanation, that the case presented complex and technical questions of product design. It is evident that men and women of common understanding would be able to determine from the pictures and testimony function of the machine in question in the case at bar. Such men and women of common understanding could easily comprehend how a mechanical guard or light curtain would operate. While expert testimony would certainly aid the trier of fact to understand the operation of the machine in question as well as the operation and design of the safety devices, it is clear that any person of normal intelligence could understand that an unguarded press brake is unreasonably dangerous for normal use.

For the reasons and authorities cited above Petitioner respectfully requests the Supreme Court to grant review of this matter.

Respectfully Submitted

William J. Meacham

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UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

No. 03-1388

Donald Shaffer,	*	
	*	
Appellant,	*	Appeal from the
V.	*	United States
	*	District Court for
Amada America, Inc.,	*	Eastern District
	*	of Missouri
Appellee.	*	[UNPUBLISHED]
	*	

Submitted : September 10, 2003

Before: WOLLMAN, FAGG and RILEY,

Circuit Judges:

PER CURIAM.

Donald Shaffer, a service engineer for Amada Engineering and Service, Inc., crushed his fingers while repairing a press brake machine, which bends

metal. Shaffer brought this diversity action against Amada America, Inc., (Amada) , the press brake's seller, alleging the press brake was defectively designed. to prove defective design, Shaffer proffered the testimony of Farid Amirouche, a doctor of mechanical engineering. The district court* granted Amada's motion in limine to exclude Dr. Amirouche's testimony under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579, (1993). Without expert testimony to prove the press brake was defective, the district court granted summary judgment to Amada. Shaffer appeals asserting the district court should not have excluded Dr. Amirouche's testimony.

We review the exclusion of expert testimony for abuse of discretion. Jaurequi v. Carter Mfg. Co. 173 F. 3d 1076, 1081 (8th Cir. 1999). Expert testimony is generally admissible when it is reliable and relevant. *Id:* Fed. R. Evid. 702. District courts have considerable latitude in deciding whether expert testimony meets this standard., and in doing so, may consider one or all *Daubert* factors. 509 U.S. at 593-94; see Jaurequi, 173 F. 3d at 1082. The polestar is the scientific validity of the principles underlying the expert's opinions. Jaqueri, 173 F. 3d at 1082.

* The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri

Dr. Amirouche would have testified the press brake's treadle bar is dangerous and unreliable, a foot electric/pneumatic switch should be used, and the press brake should have built in safety guards of a mechanical /sensory nature to prevent accidents from occurring. Dr. Amirouche based his opinions on his experience as professor and researcher in the area of mechanical engineering design and biomechanics for over twenty years. He relied on Shaffer's statement about the accident, an OSHA press release about reducing power press injuries, Safety Lines information on brake presses, Amada operating manuals, medical records, hand photographs, pictures of the press brake, video of the press brake, the Amada Engineering Elector pneumatic foot switch, and publications about injuries resulting from fingers being crushed by a press brake. The district court concluded Dr. Amirouche's testimony was unreliable, however, because the testimony was not based on sufficient facts and data. He had not designed or tested the devices he claimed would have prevented the accident, there was no peer review of his theories , and there was no evidence of the general acceptance of his abstract theory that certain devices would have prevented the accident. See Daubert 509 U.S. at 593-94.

The district court did not abuse its discretion in excluding Amirouche's testimony. The record shows Amirouche has no experience with press brake designs, he has been a full-time professor since 1984, and he has never designed a press brake, a press brake guard, or an electro-pneumatic foot switch for a press brake. Although Amirouche identified a

switch that could be used on a press brake, the switch could not be used on the press brake at issue and was not used on any press brake. Further, Amirouche has never tested press brakes or published any articles or research about press brakes. Indeed, Amirouche could not identify any code or standard applying to the design, manufacture, service, or operation of press brakes. Shaffer's industrial safety expert proffered testimony identifying the applicable design standard, but admitting that the press brake at issue met the standard's requirements. Given Dr. Amirouche's lack of design experience or expertise involving press brakes, the district court properly excluded Dr. Amirouche from testifying that the press brake was defectively designed. See Anderson v. Raymond Corp., No. 02-3393, 2003 WL 21919577, at * 2(8th Cir. Aug. 13, 2003) ; Oglesby v. General Motors corp. 190 F. 3d 244, 250-251, (4th Cir. 1999) ; Ancho v. Pentek Corp; 157 F. 3d 512, 518 (7th Cir. 1998)

Shaffer also contends that even if the district court did not abuse its discretion in excluding Dr. Amirouche's opinions, the district court committed error in granting summary judgment to Amada because Missouri law holds the failure to guard may be a design defect. Although a press without proper guarding may be unreasonably dangerous, Murphy v. L& J Press Corp. 558 F. 2d 407, 411 (8th Cir. 1977) Shaffer still had the burden to prove the design was unreasonably dangerous, Pree v. Brunswick Corp. 983 F. 2d 863, 865, (8th Cir. 1993) To do so, Shaffer must show there is a safer alternative design for the press brake that injured him. Dancy v. Hyster Co. 127 F. 3d 653-54 (8th Cir. 1997) Shaffer cannot make this showing without expert testimony. Id.

Halving properly excluded the testimony of Shaffer's only design expert, the district court properly granted summary judgment to Amada.

We thus affirm the district court.

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May 2, 2002

William J. Meacham
Law Office of William J. Meacham, P.C.
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Re: Donald Shaffer:

Dear Mr. Meacham,

Earlier this year you asked if I could provide an opinion on a case of a person who had caught his hand in a brake press and severely damaged his fingers. After our discussion, I advised you about my work and the necessary information I needed in order to formulate an opinion. Since then, you have provided me with documents, including medical records, and operating manuals, which included drawings of Amanda press. In addition to the documents described, I visited the Newco plant where I was able to examine the brake press machine and watch Mr. Schaffer reenact the events of the accident to the best of his recollection. After reviewing the documents presented to me along with the information collected at the scene I initiated my analysis and investigation of the accident.

It should be noted that, I reserve the right to reevaluate my opinion should additional information be available.

Mr. Shaffer is a 47-year-old male who had his right hand caught in a brake press machine while attempting to make a routine repair. The accident took place on March 01, 2000 where he was treated at St. Charles Hospital in St. Charles Missouri. At the hospital, they reattached the fingers and later he had to have an amputation performed on the fingers that did not survive. He had multiple digit injury.

It should be noted that Dr. Feliciano was his treating physician at the time of the accident. On March 31, 2000, he was taken to St. Joseph Hospital after an auxiliary block had been placed in the holding area. Dr. Donald Pruit performed an amputation of the long and ring finger. The amputation for the long was through the middle phalanx and the ring finger was through the proximal phalanx. In addition, Dr. Pruit revised the fixation index, long and little fingers. On August 29, 2001, Mr. Shaffer visited Dr. David Zehr at the Lankford Hand Surgery Association in Dallas, Texas. He was given a Cortisone injection in the carpal tunnel to relieve him from the pain and he was put on medication. Dr. Zehr recommended a tenolysis of the index to improve mobility and reconstruct the central slip of the little finger to improve his overall function.

To arrive at the opinion rendered in this case I relied on my experience as a Professor and Researcher in the area of Mechanical Engineering Design and Biomechanics for over 20 years. I am the author of a book in Computer Aided Design and Manufacturing and other books in the area of Design and Safety. I am listing below the additional documents and references used in my analysis.

1) Shaffer's own statement on the accident
2) OSHA press release Aims to Reduce Power Press Injuries
3) Safety lines essentials: brake presses
4) Amada operating manuals

5) Medical records
6) Hand photographs during the accident
7) Pictures of the brake press taken by a professional photographer
8) A video of the press brake taken at the seen of the accident
9) Amada Engineering – Electro-Pneumatic Foot Switch

I have reviewed a large body of professional journals, books, conference proceedings, websites, government agencies, libraries, and international and national organizations with websites and databases on injuries caused by press brakes at work. The databases that I searched during the course of my examination are those that would deal with any injuries resulting from fingers/hand being crushed by a brake press. What follows are the specific organizations, government agencies and literature that I searched in the course of this investigation:

Human Factors and Ergonomic Society

- The International Ergonomics Association
- Ergo Web
- Environmental Protection Agency
- NIH National Institute of Environmental Health Sciences
- The Center to Protect Workers Rights
- International Labour Organization

· Morbidity and Mortality Weekly Report · International Society of Exposure Analysis

· ASME American Society of Mechanical Engineers

· ISO International Organization of Standards

US Governmental Institutions

· CDC Agency for Toxic Substances and Disease Registry

· CDC National Center for Environmental Health

· Occupational Safety and Health Administration

· Bureau of Labor Statistics

· Department of Labor

· CDC National Institute for Occupational Safety and Health

· National Center for Health Statistics

· National Center for Injury Prevention

. Office of Safety and Health Administration

Description of the accident:

As per Mr. Shaffer's own description, as supported by the Newco personnel, he was working at the Newco plant on an RGLD press brake, which is one of Amada Engineering Company's newest brake machines. This press machine, according to the Newco documents, was under trial or a lease at the Newco plant at the time of the accident. It was later purchased by Newco Company and is currently operational at the plant site. Mr. Shaffer was called to the plant to repair an electrical switch, because Amada Engineering did not have this particular switch in stock at that particular time. According to Mr.

Shaffer, this switch caused the ram to slip down during a normal press brake operation. This problem had been worked on twice before. At the time of the accident, Mr. Mark Hubert foreman at the Newco Company was at the scene and looking over by Mr. Shaffer shoulders while the work was being performed. Mr. Shaffer hand on the lower ram and accidentally pushed the treadle bar with his foot, which caused the ram to come up, and consequently caught his hand between the punch and the die crushing his fingers.

To understand the mechanism of most brake press injuries resulting in fingers being amputated or badly crashed, I am providing some basic information that usually can be responsible for such an accident to happen.

- Machine is unguarded
- The guard used to protect the operator is not installed
- The guard used to protect the operator is not active
- Flaws in the brake press design and safety
- Losing balance and using the ram as a hand support
- Not using an Electro-Pneumatic Foot Switch

A combination of some of these factors can result into a person having his fingers crushed by the press machine.

Analysis of the accident:

In examining the press brake machine during my visit at the Newco plant, I discovered how easy it is to move the treadle bar downward. It required almost no resistance for up to four inches of travel. This design control mechanism resulted in an operator not seeing any movement or motion to the ram after displacing the treadle bar for over four inches. After which the required force to activate it was still manageable with little resistance. This

force control was very deceiving for a conscientious operator who wants to have complete confidence on how to operate the treadle bar. It was apparent to me that the treadle bar covered the full base of the press brake machine and could be activitated from any position of the machine. Essentially, there was not a space or void between the machine and the operator where one can stand without coming in contact with the treadle bar. At the time of my visit the part of the treadle bar was covered with a cloth or tape to provide no slippage during the push operation on the bar. It looked to me as an add-on type of cover and didn't originate from the manufacturer.

Mr. Shaffer demonstrated to me, how the brake press operates. He stood with one foot on the ground and the other on the treadle bar. The right foot that barely was in contact with the straddle bar was maintained in space when the ram was not activated. I was able to observe the operator on the same machine earlier performing the same task. It became apparent to me that the operator is standing on one foot while having the other foot on and off the treadle bar. Given the fact that there is no resistance on the treadle bar for over four inches, there exists a strong possibility for anyone not trained on posture and stability to lose balance. Any distraction such as turning around to answer a question or reach for a tool would initiate an instability causing the person to try to regain posture and stability. The latter is achieved by grabbing into something while trying to readjust the body to regain the equilibrium position.

A rigorous training will be needed to avoid catastrophic accident. To my knowledge, there are no Press brakes currently operational nationwide without a foot electric switch. The electric/pneumatic foot switch allows the operator to have his/her foot on the ground at all times, providing the support and balance needed at the job. The foot switch is a mechanism by which the pressure force is better controlled. The foot switch also provides a safety buffer by allowing the operator to stand away from the press machine.

Brake presses are powerful equipment machines used to bend and gauge heavy materials. They exert an enormous force to cause the metal to conform to certain bending in a fraction of a second. They are usually operated manually and are very common in industry. According to the US Department of labor and The Occupational Safety and Health Administration, "It is unconscionable for workers to be losing their fingers and suffering other disabling injuries simply because mechanical power presses are not properly guarded or maintained." Injuries are preventable if employers insure that guards are installed and maintained on presses to protect workers against the punching action.

To prevent finger from entering the red zone or simply for the hand to be caught between the ram and the die, the following measures could be taken:

- Provide a mechanism that prevents access to any dangerous parts by hand
- Provision of an interlocking system that is activated while repairs are being performed
- Provision of sensors to detect and differentiate between parts and hand or fingers
- Provide a sequential mode of operation where the machine moves in steps allowing time for the operator to stay away from the danger zone

I have analyzed the accident from all possible angles and what might have initiated it based on the information on the press machine design, the documents presented to me, the written testimony by Mr. Shaffer, my site visit to the plant and examination of the brake press machine. I am convinced that the accident was attributed to a loss in balance during the course of Mr. Shaffer's repair of the brake press machine. Standing on his left foot while the right foot on the treadle bar he used his right hand to grab the ram to regain his posture. A loss in balance prompted his right foot to press on the treadle bar causing his fingers to be crushed.

I cannot foresee any scenario, which would cause his hand to be in between the ram and the die while he is pressing down on the treadle bar. There are no room or space on these brake press to allow for the operator to rest his hand on, nor does the machine have a mechanism in place that could prevent such accident from happening. Based on Mr. Shaffer's claims that no technical operation, assistance or training was offered on this newly designed press machine prior to the repair being initiated. Mr. Shaffer was not advised of the potential danger the treadle bar design posed or possibility of hand/finger injuries.

In my opinion, the Brake press treadle bar is dangerous and unreliable. It is haphazardly controlled, and provides a dangerous mechanism for foot support. In my opinion, the ram could be designed in such a way to support space and allow for hand support. The latter could serve as a buffer of safety preventing such accidents from happening. I certainly believe that if a foot electric/pneumatic switch had been in use Mr. Shaffer wouldn't have had his fingers crushed and would still have his hand today. Furthermore, the press brake should have built-in safety guards of a mechanical/sensory nature that would prevent such accidents from occurring. This is especially true when repairs are being performed on the machine. According to OSHA, a safety manual on how to operate the press machine should be given to the technician before beginning a repair job.

If you have any questions or have additional information, please do not hesitate to give me a call or e-mail me at my address given below.

Sincerely,

Farid Amirouche, Ph.D.
Professor of Mechanical and Bioengineering
Director Biomechanics laboratory
Director Dynamics and Vibration laboratory

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

In March 2001, Donald Shaffer, a service engineer for Amada Engineering and Service[1], Inc., was injured while servicing a brake machine at the Newco Company's St. Charles, Missouri plant. As Shaffer was adjusting lower ram position of the up-acting press brake, the Amada model RG5020LD, somehow his right hand came between the lower ram of the machine and the upper die. As the machine cycled upward, Shaffer's fingers were crushed. He evidentially lost multiple fingers.

Shaffer sued Amada America, Inc., the seller of the press brake, claiming that it was defectively designed. Both parties retained experts, and both parties have filed motions in

---

[1] Amada Engineering merged with defendant Amada America, Inc. in July 2001, after the accident.

limine to exclude certain testimony offered by these experts. Additionally, Amada America has moved for summary judgment. For the reasons discussed below, I will grant Amada America's motion in limine with respect to Farid Amirouche – Shaffer's only expert witness regarding defective design of the press brake – and, as a consequence, I will also grant Amada's motion for summary judgment.

I. Facts

On March 1, 2000 Donald Shaffer went to the Newco Company's plant in St. Charles, Missouri, to repair a broken control switch on one of Newco's newer machines, the Amada model RG5020LD. After Shaffer finished this task, he was asked by Newco employee Mark Herbert to fix another problem with the machine. Herbert told Shaffer that the lower ram on the press brake was slipping from its lower set point.

Shaffer went through several cycles of the machine to examine the problem, using the treadle bar (a bar located at the base of the machine which is depressed in order to start the cycling of the press brake). Mark Herbert was standing behind him looking over Shaffer's right shoulder. At some point, plaintiff was injured when his hand and several of his fingers were caught between the lower ram and the upper die.

Shaffer has made several statements, but he cannot remember exactly how the accident happened. Eyewitnesses and Amada employees to whom Shaffer recounted the

events are similarly uncertain of exactly how Shaffer's hand got between the ram and the die.

Shaffer retained Dr. Farid Amirouche as an expert witness. Dr. Amirouche is prepared to testify to the following six opinions:

1. The treadle bar of the machine is dangerous and unreliable because there is excessive "Travel" in the bar that leads to operator instability.
2. The ram should have some sort of support built into the front of it, such as a ledge or a platform that extends outward, on which plaintiff could have rested his hand.
3. A foot operated electric or pneumatic switch would have prevented the accident because it would not have excessive "travel" like the treadle bar and because it could be moved farther away from the machine.
4. Safety guards of a mechanical/sensory nature would have prevented the accident. Examples of mechanical guards would be a block or a steel rod to place in the machine while it is being serviced to prevent the ram and die from closing. Examples of sensory guards would be a "light curtain" or a force-field that would detect the presence of a foreign object in the press and cause it to stop.

5. A safety manual should have been provided to Shaffer before the accident.[2]
6. Plaintiff's accident must have happened because he lost his balance with his foot on the treadle bar and then placed his hand on the lower ram in order to steady himself.

Dr. Amirouche has a Ph.D. in Mechanical Engineering and has for approximately twenty years taught courses such as Mechanical Engineering, Design, and Biomechanics at the University of Illinois at Chicago. He has written a recently-updated book called Principles of Computer-Aided Design and Manufacturing, but he admits that the pertinent chapters of his book focus more on computer-automated press brakes, rather than on operator-run brakes, such as the RG5020LD.

Dr. Amirouche has limited experience with press brakes. He operated a press brake perhaps four or five times during the course of his undergraduate engineering studies in 1977. Also while in school, in 1979, he saw a press brake being operated. He has never conducted any research on press brakes or guards for press brakes independent of this litigation. At a conference for the National Institute of Health and Safety in 1999, Amirouche participated in a

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[2] Plaintiff has never pleaded a failure to warn theory. As a result, I will not address this opinion of Dr. Amirouche. Additionally, the evidence indicates that a manual was attached to the machine, but the expert was not aware of that when he wrote his report.

committee meeting that spent about 45 minutes discussing press brakes over the course of the two-day conference. Dr. Amirouche has not published any articles regarding press brakes.

II. Defendant's Motion in Limine Dr. Amirouche

Shaffer has proffered the testimony of Dr. Amirouche, to prove the defectiveness of the press brake. Amada has moved to exclude all expert testimony offered by Dr. Amirouche under Rule 702 and the requirements of Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid.702.

Under Daubert, the Court must determine whether the reasoning and methodology underlying the proposed expert's testimony is valid. Peitzmeier v. Hennessey Indus., Inc., 97F.3d 293, 297 (8th Cir. 1996). In making this inquiry, Daubert offers four non-exclusive factors: (1) whether the concept has been

tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community. Daubert, 509 U.S. at 593-95.

Dr. Amirouche fails the Rule 702 and Daubert requirements for admissibility of expert testimony. First, Dr. Amirouche's testimony is unreliable. It is not based on sufficient facts and data. Dr. Amirouche has virtually no experience with press brakes, other than his participation in a forty-minute discussion of press brakes during a two-day conference, and the limited experience he had during his undergraduate studies approximately 25 years ago. Although he reviewed some information about press brakes on the internet, none of that information provided a basis for his opinions.

Second, Dr. Amirouche has not designed or tested the devices he claims would have prevented Mr. Shaffer's accident. He has not even sketched any of these possible alternative designs. He has no knowledge as to whether any of his proposals would work or would interfere with the normal operation of the press brake. Similarly, Amirouche offers no quantifiable evidence to support his theory that excessive "travel" in the treadle bar caused the accident. He has simple made on-site measurements that he recorded in a one-page hand written note, purporting to show the "travel" but not trying that "travel" to any cause of the accident.

Third, there has been no peer review of Dr. Amirouche's theories of alternative design. Because there has been no testing of the

alternative designs, we also do not know the potential rate of error. Finally, there is no evidence of the general acceptance of Amirouche's abstract theory that his laundry list of devices would have prevented the accident.

Shaffer claims Dr. Amirouche is similar to the expert who was admitted in Lauzon v. Senco Prods., 270 F.3d 681 (8th Cir. 2001), which involved an allegedly defective nail gun. In Lauzon, the expert conducted various scientific tests in arriving at his opinion that the nail gun was defective – he measured the trigger force of the gun and the nail speed from various distances, conducted a pendulum test to measure recoil forces, and recreated the roof where the accident occurred. Id. At 688-89. Moreover, the plaintiff's proffered expert published an article about the allegedly defective nail gun in the Journal of the National Academy of Forensic Engineers. Id. At 690. He also consulted two specific articles regarding nail gun injuries and the alternative design he was advocating.

Dr. Amirouche stands in stark contrast to the controverted expert in Lauzon. The extent of his examination of the actual machine, as well as the information gathered from Newco employees regarding the normal operation of the press brake during his only visit to the Newco plant, covered only one handwritten page of notes. It is estimated that this visit to the Newco plant took only ninety minutes.

Amirouche lacks even a comprehensive understanding of how the press brake at issue works. For instance, Amirouche does not know where the press brake's "on/off" switch is

located. He does not know what mechanism is actuated by use of the treadle bar – which he claims is defectively designed and unreasonable dangerous. Amirouche Depo. At 246 (I did not really look at that machine in particular, finding out whether it's a gear system or hydraulic system, electrical system, motor of some sort that actually keep – you know, moves it, you know."). Dr. Amirouche admits that the only literature he consulted specific to the press brake at issue in this case was the operator's manual and the parts list. He did not test his theories to see whether the general safety measures he proposes would actually work on the RG5020LD without altering the purpose for which the machine is used (bending coffee pot component parts). Moreover, unlike the Lauzon expert, Dr. Amirouche made no attempt to either quantify his findings of excessive "travel" in the treadle bar, like measuring the force required to activate the machine. Nor has he subjected his "research" – which was almost exclusively documents he gathered from the Internet solely for the purpose of this litigation – and assorted theories of alternative design to peer review. The fact that Dr. Amirouche is a professor and an engineer does not grant him license to label as "scientific" unsubstantiated or overly broad opinions.

Despite Shaffer's protestations, Dr. Amirouche is similar to the experts in several cases that were mentioned in Lauzon. For instance, in Jarequi v. Carter Manuf. Co., Inc., 173 F.3d 1076, 1080 (8th Cir. 1999), the Eighth Circuit affirmed the exclusion of the plaintiff's proffered expert who attempted to testify that the

corn head on a combine was defective because it lacked "awareness barriers" that warned of the hazard zone where the gathering chains of the combine emerged from the snout of the machine. The expert did not study the feasibility of this idea, much less design or test it. Id. He was unaware of any study regarding the effectiveness of such a barrier or of any manufacturer incorporating such an idea into a finished product. Id. As with Dr. Amirouche's proposals, the Jarequi expert did not "construct or ever draw the suggested device, much less test its utility as a safety device or its compatibility with the corn head's proper function." Id. At 1084. (8th Cir. 1996), the district court excluded the proffered testimony of an expert who wished to testify that a tire changing machine was unreasonably dangerous. The proposed expert opined that the tire changing machine acted as a "launch pad" for an overinflated tire, an effect that he said could be reduced with several changes he proposed. Id. However, like Dr. Amirouche, the expert had neither designed nor tested the proposed design for safety or utility although (unlike Dr. Amirouche) he had drawn some rough sketches. Id. These sketched were not adapted into engineering drawings, much less actual prototypes. Id. Again, similar to Dr. Amirouche's proposed changes, none of the Peitzmeier expert's proposed changes were subject to peer review. Id. The Eighth Circuit affirmed the district court's decision to exclude the expert's testimony. Id. At 298. See also Dancy v. Hyster Co., 127F.3d 649 (8th Cir. 1999) (Affirming exclusion of expert testimony that forklift used by

defendant should have a guard where expert had not tested his theory or designed the alternative guard).

Because I find that the proposed testimony of Dr. Farid Amirouche does not satisfy the requirements of Rule 702 and cannot survive a Daubert challenge, I will grant Amada' motion in limine and exclude his testimony.

III. Summary Judgment Motion

In determining whether summary judgment should issue, the Court views the facts and inferences from the facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P.56©; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material facts exist. Fed.R.Civ.P.56(e). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

Missouri law requires Shaffer to prove the following elements: (1) Amada America sold the press brake in the course of its business; (2) the press brake was in a defective condition that

made it unreasonably dangerous when put to a reasonably anticipated use; (3) the press brake was used in a manner reasonably anticipated; and (4) Shaffer was damaged by the defective condition that existed when the product was sold. Rauscher v. General Motors, 905S.W.2d 158, 160 (Mo. Ct. App. 1995). Amada America has shown that the record is devoid of any admissible evidence as to the second element – that the press brake was in a defective condition that made it unreasonably dangerous to operate. Because of this complete failure of proof of an essential element, Amada is entitled to judgment as a matter of law.

Plaintiff has filed depositions of Amada Engineering employees James Donald Rush, John Porco, and Themis Alexopoulos. These additional filings do not establish the defectiveness or unreasonable dangerousness of the RG5020LD press brake that Mr. Shaffer was repairing the day he was injured. The Alexopoulos and Rush depositions do establish that Amada offered some extra guarding devices at the time the RG5020LD was sold to Newco, but it does not follow from this evidence that the RG5020LD is defective without these devices or that they would have prevented the accident that occurred here.

The law is not so rigid as to require a manufacturer to sell only those products equipped with every available safety device. Linegar v. Armour of America, Inc., 909 F2d 1150, 1154 (8th Cir. 1990). And the absence of an available safety feature does not, by itself, mean a product is defective. Missouri law, instead, "demands that we focus our efforts on

defects that are unreasonably dangerous." Sandage v. Bankhead Enterp., Inc., 177 F.3d 670, 673 (8th Cir. 1999).

This is not a case like Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599 (Mo. Ct. App. 1984), where the circumstantial evidence presented would allow a jury to find defect without expert testimony. In Patterson, a baby bottle exploded, sending shards of glass that severed tendons in a mother's hand. Id. At 601. This case is not so simple.

This case involves a complex piece of industrial machinery. Because a finding of defect cannot rest on conjecture or speculation, Crump v. MacNaught P.T.Y., Ltd., 743 S.W.2d 532, 534 (Mo.Ct.App. 1987), Shaffer needs competent expert testimony to establish that this press brake is defective and unreasonably dangerous. Without expert testimony, we are left with evidence of an accident. The fact that an accident happened, standing alone, does not establish a case of product defect. Winters v. Sears, Roebuck, & Co., 554 S.W.2d 565, 571 (Mo.Ct.App. 1977).

Plaintiff's remaining expert, Dr. Miranda Savage, does not provide sufficient expert testimony regarding the allegedly defective condition of the RG5020LD press brake to save the case from summary judgment. Dr. Savage only opines that an OSHA standard was violated when Shaffer, flowing Amada Engineering's procedure, attempted to fix the press brake. But even if the OSHA regulations provide the standard of care for workers such as Mr. Shaffer, Savage's testimony is not helpful to the essential inquiry in this case – whether the product was in a

defective condition when put to a reasonably anticipated use. Savage's testimony regarding Shaffer's working conditions is therefore insufficient to overcome Amada's motion for summary judgment.

V. Conclusion

The opinions and testimony of Dr. Farid Amirouche do not meet the requirements for expert testimony, as set forth in Fed. R .Evid. 702 and Daubert. Without this testimony, there is no evidence that plaintiff can introduce that could prove that the Amada RF5020LD is defective and unreasonably dangerous, and I will therefore grant Amada's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [#31-1] is granted;

IT IS FURTHER ORDERED that Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouchce [#37-1] is granted;

IT IS FURTHER ORDERED that all other pending motions are denied as moot.

A separate judgment in accord with this Memorandum and Order is entered this same date.

Dated this 6th day of January, 2004.

Catherine D. Perry
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

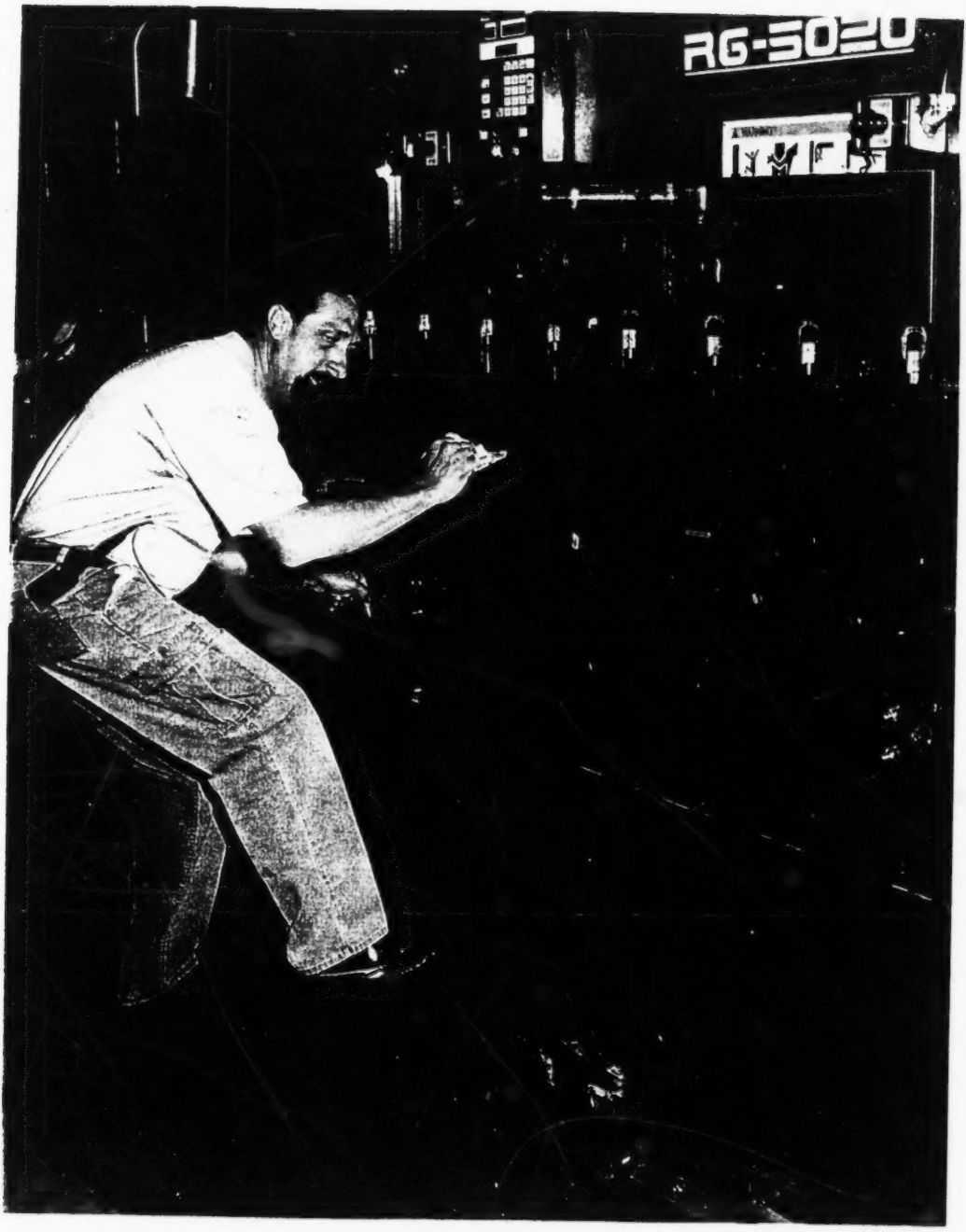
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Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
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AMADA AMERICA, INC.,	)	
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Defendant.	)	

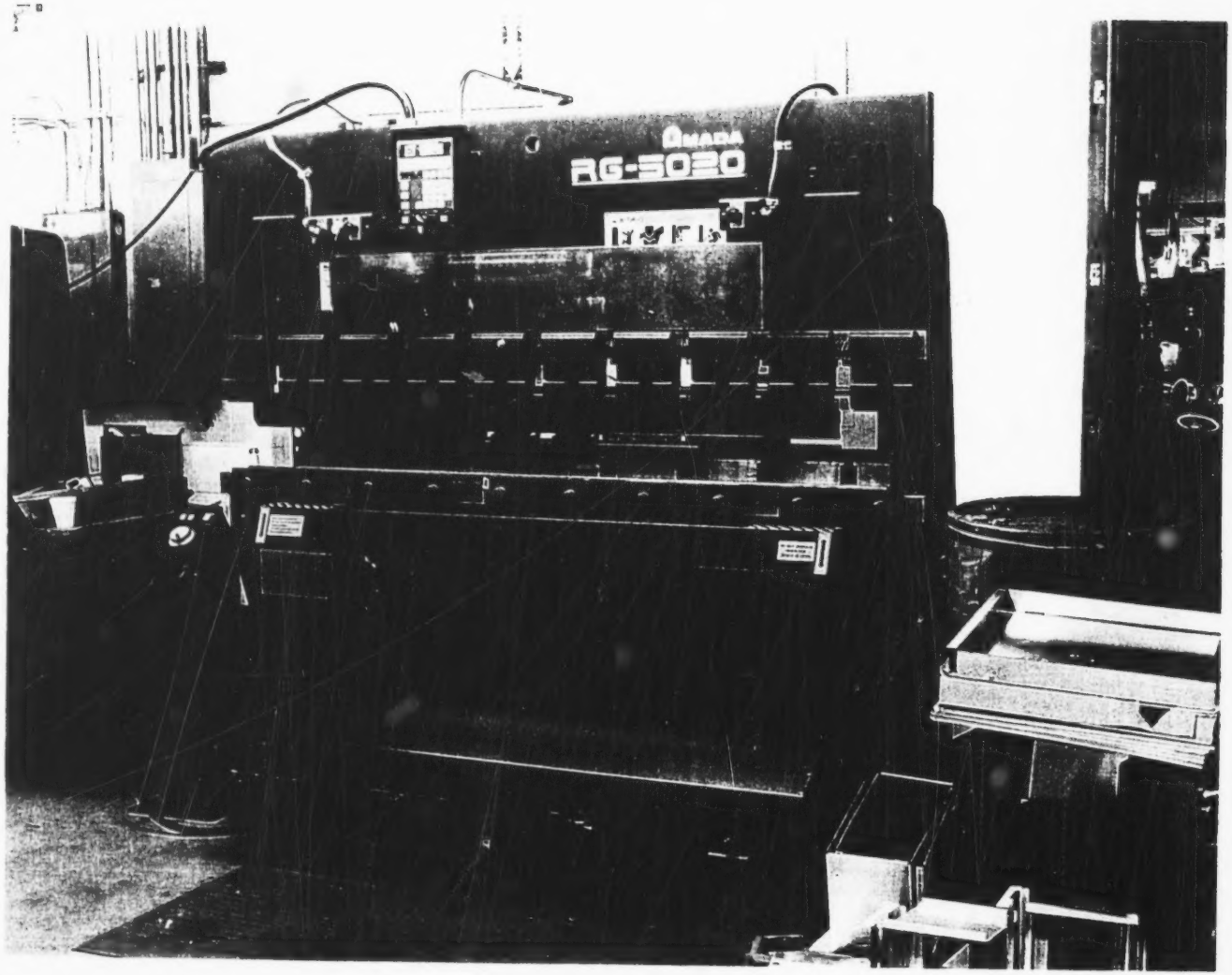
JUDGMENT

In accordance with the Memorandum and Order entered this same date, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that judgment is entered in favor of defendant, that the plaintiff take nothing, that the action be dismissed on the merits, and that defendant recover of plaintiff its costs of this action.

Dated this 6th day of January, 2004

_____
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE


RG-5020


AMADA
RG-5020

Amada Engineering
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Retrofit

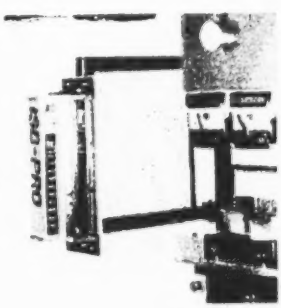
Press Brake Safety

Dual Palm Buttons



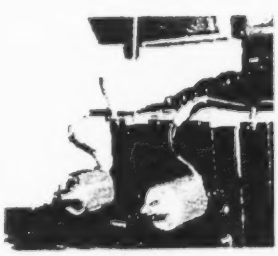
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ISB Programmable Light Curtains



The ISB Programmable Beam blank-out light curtain is our unique safety solution for Amada press brake guarding. ISB light curtains provide optimum safety with minimum production interruption. The intelligent control system, not the operator, allows the workpiece profile to determine which beams are activated. Safety no longer has to come at the expense of productivity.

Electromagnetic Fingers



These electromagnets are designed to hold the work being formed in the press brake while getting the operator's hands away from the "point of operation" during the forming cycle. A new control feature permits

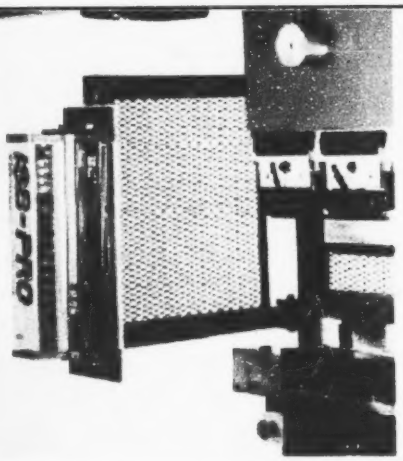
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The ISB Programm Beam blank-out light curtain is our unique safety solution for Amada press brake guarding. ISB light curtains provide optimum safety with minimum production interruption. The intelligent control system, not the operator, allows the workpiece profile to determine which beams are activated. Safety no longer has to come at the expense of productivity.

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(2)

No. 03-1170

IN THE

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

v.

AMADA AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(314) 552-6000

Attorneys for Respondent

STATEMENT OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are listed in the caption of the case. The parent companies of Respondent Amada America, Inc. are Amada Co., Ltd. and Amada Mechanics, Co., Ltd. Amada America, Inc. has no subsidiaries not wholly owned. No U.S. publicly held company owns ten (10) percent or more of Amada America, Inc.'s stock.

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STATEMENT OF THE CASE

A. Summary

From 1995 until March 1, 2000, Petitioner Donald Shaffer ("Petitioner") worked as a service engineer for Amada Engineering and Service, Inc. ("AESI"). On March 1, 2000, Petitioner was injured while servicing an RG 5020LD press brake (the "Press Brake") at Newco Enterprises in St. Charles, Missouri. The Press Brake was sold to Newco by Respondent Amada America, Inc. ("Amada America"). Petitioner filed his Complaint alleging product liability claims against Amada America. Specifically, Petitioner alleged that the Press Brake was defectively designed and that he was injured as a result.

After discovery, the District Court granted Amada America's motion in limine to exclude the testimony and opinions of Petitioner's sole design expert, Dr. Farid Amirouche ("Amirouche").[1] The District Court held that Amirouche's testimony and opinions did not satisfy the tests for admissibility set forth by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). Having excluded the testimony and opinions of Petitioner's design expert, the District Court held that Petitioner had failed to produce any evidence demonstrating that the Press Brake was unsafe and unreasonably dangerous, and as a result, the District Court

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[1] Petitioner states that the District Court ruled on Amada America's motion to exclude Amirouche "without holding a Daubert hearing...." Petition, p.7. However, Petitioner never requested such a hearing, nor is one required. *See Anderson v. Raymond Corp.*, 340 F.3d 520, 523-24 (8th Cir. 2003) (excluding testimony and opinions of engineer proffered as expert without holding hearing); *see also U.S. v. Solorio-Tafolla*, 324 F.3d 964, 965-66, (8th Cir. 2003).

granted summary judgment in favor of Amada America on each of Petitioner's claims.

Petitioner filed his appeal with the United States Court of Appeals for the Eighth Circuit, alleging that the District Court abused its discretion in excluding Amirouche's testimony and opinions and that the District Court erred in granting summary judgment in favor of Amada America. In an unpublished, per curiam opinion, the Eighth Circuit affirmed the District Court's judgment in all respects. *See* Petition, pp. 31-35. The Eighth Circuit subsequently denied Petitioner's motion for rehearing or for rehearing en banc.

B. Petitioner's employment

As a service engineer at AESI, Petitioner serviced six model press brakes sold by Amada America, including that at issue, as well as other press brakes, punch presses, and sheers. Petitioner and another person were the ones who installed the Press Brake at Newco. Prior to his accident, Petitioner had serviced the Press Brake at issue two times. While working for AESI, Petitioner had operated and/or serviced press brakes between 50 and 100 times prior to the time of his accident, though Petitioner has no experience in designing or manufacturing press brakes.

C. The Press Brake

A press brake bends metal. The Press Brake was designed by Amada Co. Ltd. and was manufactured by Amada Mechanics Co., Ltd. Amada America did not design or manufacture the Press Brake. Amada America sold the Press Brake to Newco in 1999. At the time of Petitioner's accident, and at the time of Petitioner's action herein, Newco was still using the Press Brake.

The Press Brake consists of two parallel side frames, which support a fixed upper beam holding tooling such as a die and a lower movable ram. A treadle bar controls the movement of the lower ram. The treadle bar, when fully

depressed, causes the lower ram to move upward and press against the upper die to bend the metal. Release of the treadle bar causes the lower ram to stop its upward movement and descend to its original position. The distance from the lowest downward movement of the lower ram to the highest upper movement is adjustable using the lower ram positioning lever located on the left side of the machine.

D. Petitioner's accident

On March 1, 2000, the day of the accident, Petitioner was at Newco, repairing a broken control switch on the Press Brake.[2] Petitioner testified in his deposition that, after completing the repair on the control switch, he was stopped by Mark Herbert ("Herbert"), a press brake operator at Newco, and told that the lower ram on the Press Brake was slipping down from its lower set point. With the Press Brake turned on, Petitioner moved the lower ram up and down several times using the treadle bar, with Herbert standing a few inches from Petitioner, looking over Petitioner's right shoulder.[3] At some point, Petitioner was injured when he placed his hand between the lower ram and the upper die.

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[2] On page 5 of his Petition, Petitioner incorrectly states that he was attempting to correct a problem with the lower beam at the time of his injury. Not only is this inaccurate (Petitioner was called to Newco to correct a broken switch), but also contradicts Petitioner's own statement on page 10 of his brief before the 8th Circuit, wherein he stated that he was at Newco to fix a broken switch.

[3] Newco had a lockout tag out procedure, which would normally have rendered the Press Brake inoperable because of the problem with the control switch. However, that Newco procedure did not apply to Petitioner, as he was the service personnel qualified and authorized to service the Press Brake. Petitioner himself noted that "in order to perform the repair ... the machine had to be in an operational mode; it could not be disconnected from the power source."

E. Petitioner's explanation of the accident

Petitioner described how the accident occurred in three separate recordings—all pointing to Petitioner's conduct in placing his hand in harm's way. Petitioner described his accident in his own two-page typed statement, entitled "My Description Of Accident On March 1st," wherein he states, "[a]s I was showing [Mark Herbert the operation of the mechanical locking device] I rested my hand on the lower ram and became completely distracted. The ram came up crushing my hand between the punch and the die."

On March 26, 2002, Petitioner demonstrated how the accident occurred in a videotaped demonstration at Newco. Petitioner stated on the videotape that "for some reason I laid my hand" on the ram; "the ram came up and crushed it." Petitioner also described how the accident occurred also during his deposition, where he testified, "I don't know what happened there. I know that my hand was in there, but I don't know if I was resting it. I don't know if I was grabbing at a bar. I don't know none of that . . . . I don't know if I lost my balance or what. I know I was talking to Mark [Herbert]." Herbert was standing within inches of Petitioner, looking over his right shoulder. Herbert testified that he did not see Petitioner slip or fall into the machine. When asked what he believed caused the accident, Herbert testified that "it was just an unfortunate accident."

Bob Bellemey, an employee of AESI and a friend of Petitioner, testified that Petitioner's accident was caused when Petitioner placed his hand between the lower ram and the die and then stepped on the treadle bar. Bellemey testified in his deposition:

> [Petitioner] said that he had f***** up. He said, 'I had finished the job and I was getting ready to pack up, and one of the operators'...'asked what did you do to fix my machine.' And he said, 'Well, come

here, let me show you.' He said he went over there and he said he grabbed the locking mechanism and put his hand on the bed of the ram, stepped on the treadle bar and was talking to the guy that was to his right and sort of behind him and then he felt pressure on his fingers and he looked up at the ram where his hand was and as he looked up then he cut his fingers off. He said it was just a stupid mistake....

F. Petitioner's sole design expert, Amirouche

Petitioner alleged in this action that the Press Brake "was unreasonably dangerous due to [various] design and manufacturing defects." On or about May 2, 2002, Petitioner produced Amirouche's Rule 26 Report identifying him as Petitioner's sole design expert. Amirouche, a mechanical engineer, was endorsed by Petitioner to testify as to the claimed defective design of the Press Brake and alternative guarding designs.[4]

1. Amirouche's lack of qualifications to testify as an expert on the Press Brake or guards or foot switches for the Press Brake

Amirouche is a mechanical engineer, specializing in the physics and dynamics of moving parts and systems, not the safe design of machines. Amirouche earned his Ph.D. in the

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[4] Amirouche offered the following five opinions: (a) the treadle bar on the Press Brake was "dangerous and unreliable" at the time of Petitioner's injury; (b) the ram on the Press Brake should have been designed in such a way to allow for hand support and serve as a safety buffer; (c) the use of a foot electric/pneumatic switch on the Press Brake would have prevented Petitioner's injury; (d) safety guards "of a mechanism/sensory nature" on the Press Brake would have prevented Petitioner's injury; and (e) a safety manual on how to operate the Press Brake should have been given to Petitioner before he serviced the Press Brake.

field of "multibody dynamics." Amirouche obtained no other formal education after his doctoral work in 1984. He has been a full-time professor since 1984.

Amirouche has never worked for a company that manufactured or designed press brakes, guards for press brakes or component parts for press brakes. Amirouche has never worked as a press brake operator and has only operated a press brake "maybe four or five times" in his life, while enrolled in a training program for undergraduate students in 1977. Of those four or five times, Amirouche never turned on those machines. He has never operated the Press Brake at issue in this case.

Additionally, Amirouche has no experience with press brake designs in his academic career as an engineering professor. He had never conducted any research on press brakes or guards for press brakes before becoming involved in this case. Amirouche has never designed a press brake, a guard for a press brake, or an electro-pneumatic foot switch for a press brake.

Amirouche has never tested press brakes in any way or published any articles or research concerning press brakes. Amirouche admitted that his book, Computer Aided Design and Manufacturing (referenced at Petition, p. 16), deals with computer numerical control programming of machines in general and would be of no use for any press brake which required an operator to run it, like the Press Brake.

Petitioner notes Amirouche's experience in 1999 on a committee for the National Institute of Health and Safety ("NIOSH"). Petition, p. 16. However, even Amirouche admitted that the NIOSH committee spent less than 40 minutes talking about press brakes over the course of two days. Any mention of press brakes occurred within the context of the committee's subject matter, which was "ergonomic factors and safety" in relation to interaction of operators and machines, including such unrelated products as

jackhammers and seats. Amirouche received no written information about press brakes during this meeting, and he could not identify any information from the committee upon which he relied in forming his opinions.

Amirouche has never testified in a case involving press brakes, guards for press brakes, or the use of electro-pneumatic foot switches for press brakes. Amirouche has only testified in one case involving electro-pneumatic foot switches at all, though that testimony pertained to patent infringement regarding a foot switch for vehicle seats, a product quite different from press brakes. He has never given testimony on any case similar to what happened to Petitioner.

Most striking about Amirouche's testimony is that, even though he has been endorsed to criticize the design of the Press Brake, he could not identify one code or standard that applied to the design, manufacture, service or operation of press brakes. In contrast, Petitioner's industrial safety expert, Mandara Savage ("Savage"), was not only able to identify the applicable design standard, ANSI B11.3-1982, for press brakes, but admitted that the Press Brake at issue met the requirements of that standard. (ANSI B11.3 is entitled "ANSI for Machine Tools-Power Press Brakes-Safety Requirements for Construction, Care and Use.")

2. Amirouche's observations and "testing" relied upon in forming his opinions

In preparation of his opinions, Amirouche's only inspection or observation of the Press Brake occurred during the March 26, 2002 inspection and videotaped demonstration at Newco. During this inspection, Amirouche took a few measurements of the Press Brake, which were so minimal that he was able to record them, along with the rest of his "analysis" of the Press Brake, on one handwritten page of notes. Amirouche's testing of the treadle bar itself was similarly superficial, consisting of stepping on the Press

Brake's treadle bar "three or four times" on the date of the inspection, nearly two years after Petitioner's accident occurred. Amirouche never operated this Press Brake (or any other press brake) at any time. At his deposition, Amirouche could not identify the location of the Press Brake's "on/off" button.

Finally, Petitioner provides a "partial list" of the materials reviewed by Amirouche in forming his opinions for this case. Petition, p. 16. However, Amirouche admitted that many of the materials he reviewed offered no assistance in forming his opinions. When questioned Amirouche could point to no materials he reviewed which were specific to the Press Brake other than the Operator's Manual and the Parts List. Amirouche admitted that he did not read all of the Operator's Manual, "just the general description in terms of how to operate the machine." Amirouche said that the Parts List "[t]echnically did not help me...."

Amirouche had not corresponded with any "designer, manufacturer or seller of press brakes about this case," nor any expert in the field. Amirouche failed to examine the industry practice regarding guards on press brakes; in fact, he could not name any manufacturers of press brakes other than his belief that Cincinnati Malicron and General Electric manufactured press brakes. Besides these two names, Amirouche could only speculate that press brakes were manufactured by manufacturers in Germany and Japan—the names of who he could not state.

In connection with his opinions in this case, Amirouche proposed several alternative designs for the Press Brake, such as a "platform" which would have prevented Petitioner's hand from being pinched between the die and the ram. However, Amirouche admitted that he did not test, build or install, or even design or sketch, such a platform for the Press Brake at issue or for any press brake. Amirouche also suggested that "sensory elements" or a "block" would

have prevented the accident, but he neither tested nor sketched either of these proposed designs. Amirouche admitted that he conducted no tests to determine if his proposed block would have any effect on, or might even damage, the internal mechanism of the Press Brake. Amirouche admitted that he did not examine how his proposed mechanical or sensory elements might affect the use of the Press Brake. He also did not know how much it would cost to manufacture his proposed mechanical or sensory elements. Finally, Amirouche could not identify one press brake manufacturer who uses his proposed design changes on any press brake.

G. Petitioner's other liability expert

Petitioner endorsed Savage, an industrial safety engineer, to testify regarding his belief as to the applicability of OSHA and an alleged violation by Amada America of an OSHA standard. Savage offered no opinions concerning the design of the Press Brake.

REASONS FOR DENYING THE PETITION

A. Summary of argument

The Petition states no compelling reason sufficient to grant a petition for writ of certiorari. To the contrary, the error complained of in the Petition consists of an alleged misapplication of a properly stated rule of law, which under Supreme Court Rule 10 is "rarely" the basis for granting a writ. (Supreme Court Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioner has failed to demonstrate that a relevant and significant circuit split exists on any issue appealed or that this Court should otherwise grant certiorari in the present

case. Petitioner contends that the Eighth Circuit's decision in the present case conflicts with decisions of other circuits (Petition, p. 13), though he fails to demonstrate with any particularity how any rule of law relied upon or cited by the Eighth Circuit conflicts with any particular rule of law cited by any other circuit. Similarly, Petitioner summarily contends that the decision conflicts with the Eighth Circuit's own precedent (Petition, p. 14) but again fails to show even an example of such alleged conflict.

Instead, the Eighth Circuit correctly affirmed the District Court's order excluding the testimony and opinions of Amirouche and granting summary judgment in favor of Amada America. Amirouche's testimony and opinions were properly excluded because:

(a) he has no experience in the design, manufacture, and/or testing of press brakes, foot switches for press brakes, or guards for press brakes prior to being contacted by Petitioner's counsel in relation to this case;

(b) the case at issue is the first time that he has ever been asked to evaluate the design of a press brake, a switch for a press brake or a guard for a press brake;

(c) he has not built, tested, or even sketched his proposed alternative designs;

(d) he is unaware of any manufacturer of press brakes that uses his proposed alternative designs;

(e) he is unaware of any industry standard that suggests or requires the type of designs he is proposing;

(f) he has no factual basis to conclude that the alternative designs would have prevented Petitioner's injuries, nor can he state with certainty how Petitioner's injuries even occurred in the first place;

(g) he is not qualified to express the opinion that his alternative designs are practical or feasible; and

(h) his proposed alternative designs are merely concepts being offered by one with no background or experience with the product sufficient to know whether the designs are either workable or feasible.

Based upon these factors, the District Court did not abuse its discretion in excluding Amirouche's testimony and opinions because not only is he unqualified to testify or offer expert opinions regarding the Press Brake, but Plaintiff failed to establish that his opinions and basis for opinions are sufficiently reliable.

Amirouche's testimony and opinions having been excluded, the District Court did not err in holding under Missouri law that Petitioner failed to introduce evidence to prove that the Press Brake was defective and unreasonably dangerous. Without evidence to show that the Press Brake was defective and unreasonably dangerous, Petitioner was unable to satisfy one of the required elements to state a cause of action for design defect under Missouri law. For these reasons, the District Court did not err in granting summary judgment in favor of Amada America on Petitioner's design defect claims.

This Court should deny the Petition for Writ of Certiorari because the courts below fully considered and correctly decided the issues, only questions of evidence and factual findings are involved, this Court's prior decisions are controlling, the allegedly conflicting decisions are distinguishable on their facts, the decision below follows an unbroken line of authority, and because review of an abuse of discretion is not sufficiently important to merit the Court's consideration.

B. The Eighth Circuit correctly affirmed the District Court's decision to exclude the testimony and opinions of Amirouche, and no conflict exists between the Eighth Circuit's decision and other decisions of the Eighth Circuit or of other circuits.

Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The criteria for determining admissibility under Rule 702 is set forth in *Daubert* and are properly applied "not only to 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho*, 526 U.S. at 150.

Daubert firmly establishes the trial court's "gatekeeping" responsibility for determining admissibility of expert witness testimony: "[t]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* Expert witness testimony must be based on "knowledge" that does not include unsupported speculation. *Daubert*, 113 S. Ct. at 2795. In this regard, the following two-pronged analysis with respect to the admissibility of proffered expert testimony has been established:

> (1) the court must determine whether the expert is sufficiently qualified "by reason of training, education or experience" to render opinions in front of a jury; and
>
> (2) if the Court determines that the expert is qualified to express opinions on the subject matter, the Court must then examine the opinions, and the basis for the opinions, to determine as a threshold matter whether the opinions are sufficiently reliable to be admissible.

Daubert, 113 S. Ct. at 2795-96. This Court reaffirmed this test in *Kumho*, stating, "where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has 'a reliable basis in knowledge and experience of [the relevant] discipline.'" 119 S. Ct. at 1169.

Finally, as the proponent of Amirouche's testimony, Petitioner bore the burden of proving by a preponderance of the evidence that the testimony is admissible. *Daubert*, 113 S. Ct. at 2800, Fn. 10. This Court reviews the District Court's decision to exclude the testimony and opinions of Amirouche under the deferential "abuse of discretion" standard. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141, 118 S. Ct. 512, 517 (1997); and *Kumho*, 526 U.S. at 152. "[W]hether *Daubert's* specific factors are, or are not, reasonable matters of reliability in a particular case is a matter that the law grants the trial judge *broad latitude* to determine." *Id.* at 153 (emphasis added). The District Court correctly exercised its discretion in concluding that Petitioner did not establish his burden of showing that: (1) Amirouche is qualified to offer opinions regarding an alleged defective design of the Press Brake, and (2) his opinions and the basis for them are sufficiently reliable to be admissible.

1. Amirouche is not qualified to testify or offer expert opinions regarding the Press Brake at issue.

The District Court correctly prohibited Amirouche from expressing any opinion concerning an allegedly defective design of the Press Brake because he lacked the requisite "knowledge, skill, experience, training and education" required under Rule 702 and *Daubert*. Amirouche is a mechanical engineer, specializing in the physics and dynamics of moving parts and systems, not the safe design of machines, and as such is not qualified to offer opinions

concerning the design of guards on press brakes. "Expertise in the technology of fruit is not sufficient when analyzing the science of apples. The courts have excluded the testimony of engineers because their expertise was not particular to the science involved in the case." *Diviero v. Uniroyal Goodrich Tire Co.*, 919 F. Supp. 1353, 1357 (D. Ariz. 1996), *aff'd*, 114 F.3d 851 (9th Cir. 1997). Amirouche's engineering expertise is not "particular to the science involved in the case." *Id.*

Petitioner suggests that "Professor Amirouche is a highly qualified expert in the fields of machine and design safety." Petition, p. 20. However, the kinds of "experience" cited by Petitioner involve only general fields unrelated to this design defect case (biomechanics and ergonomics) and do not overcome Amirouche's utter unfamiliarity with press brakes or with this Press Brake. It is inappropriate to allow a purported expert to testify regarding design issues without design experience or expertise involving the particular product at issue. *See, e.g., Oglesby v. General Motors Corp.*, 190 F.3d 244, 247 (4th Cir. 1999) (excluding testimony of "well-qualified mechanical engineer" when engineer had no specialized experience or expertise in evaluating either automobile manufacturing processes or the strength of plastic automobile component parts); *Ancho v. Pentek Corp.*, 157 F.3d 512, 517 (7th Cir. 1998) (refusing to allow mechanical engineer with no experience designing or evaluating factories to testify as expert on industrial plant configurations); *Tokio Marine & Fire Insurance Co. v. Grove Manufacturing Co.*, 958 F.2d 1169, 1173-75 (1st Cir. 1992) (engineer not qualified to express opinion that crane was defective because he had no experience operating cranes, had never designed a crane, had never worked for a crane manufacturer, and was not an expert in crane maintenance or operation, although he had investigated over 60 crane cases and had some experience preparing design specifications for the purchasing of cranes); and *Diviero*, 919 F. Supp. at 1357 (engineer who had worked with tires for

many years not qualified to render opinion on steel belted tires where he had never conducted testing of steel belted tires and could not describe the similarities between steel belted radial tires and other tires).

Petitioner attempts to rely on the same argument as the proponents of these experts, arguing that Amirouche's experience with machines generally *ipso facto* renders him an expert on the Press Brake. *See, e.g.*, Petition, p. 21 ("Amirouche applied recognized engineering principals to his analysis of the events leading to the injury. . . ."). However, an individual "who is a mechanical engineer is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering.... [T]he engineer must possess 'some special skill, knowledge or experience' concerning the particular issue before the court." *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 392 (D. Md. 2001). The bare assertion that Amirouche is a mechanical engineer does not automatically qualify him as an expert regarding any issue within that "vast field," nor does his education as a mechanical engineer by itself qualify him to testify as an expert on the subject of press brake designs, when he otherwise has had virtually no experience with press brakes or guards for press brakes. The District Court correctly concluded that Amirouche "has virtually no experience with press brakes...." (Order, p. 6).

Contrary to Petitioner's unsupported heading in his brief, there is no conflict among the various circuits on this point. Petitioner contends that "an expert is not required to have direct design experience with the product at issue" and cites *Stagl v. Delta Airlines*, 117 F.3d 76 (2d Cir. 1997), and *DaSilva v. American Brands, Inc.*, 854 F.2d 356 (1st Cir. 1988), as alleged "proof" of a conflict with the Eighth Circuit's Opinion in this case. These two cases rely on exactly the same rules of law as the Eighth Circuit did in the present case and, decided upon markedly different facts,

present no such circuit split. For example, in *DaSilva*, the First Circuit held that the district court did not abuse its discretion in admitting the testimony of the plaintiff's expert even though the expert, a mechanical engineer, had no design experience with the particular machine at issue in the case. *Id.* at 361. However, the First Circuit relied in large part upon the fact that the expert "had extensive experience evaluating and recommending safety devices for machines, and he was *familiar from prior experience with the operation of the Banbury* [the particular model machine at issue in the case]." *Id.* (emphasis added) . In contrast, Amirouche has had *no experience whatsoever* with this model Press Brake before becoming involved in this case, nor has he had any experience building or designing guards for press brakes. These two facts alone distinguish this case and *DaSilva*.

Petitioner's reliance on *Stagl*, 117 F.3d at 76, is similarly misplaced. There, the plaintiff claimed that she was injured by an unreasonably unsafe baggage delivery system. *Id.* at 82. The plaintiff's expert, an engineer specializing in the field of "interaction between machines and people," opined that the process established by the defendant for pickup of luggage created an unreasonably unsafe condition. *Id.* The Second Circuit reversed the District Court's exclusion of the expert, holding that the expert was sufficiently qualified because "this interaction between people and machinery is clearly of the sort that [the expert] has worked with in depth." *Id.* *Stagl* did not hold that an expert is qualified despite his utter lack of any experience with a subject, as Petitioner suggests. Rather, the expert in *Stagl* regularly worked with and studied the source of the injury therein (the negligent design of a method of interaction between people and machinery). In contrast, Amirouche's opinions were directed to design and alternative designs even though he has no experience with design or operation issues for the Press Brake. Amirouche has never designed, built, studied or rendered an opinion on press brakes or press brake guards.

Amirouche (unlike the expert in *Stagl*) has ventured outside area of expertise and experiences by rendering his design opinions concerning a product that he could not even identify where the on/off switch was located. Simply, the Eighth Circuit's decision in this case does not conflict with *Stagl*.

2. Daubert renders inadmissible Amirouche's testimony and opinions regarding design defect.

a. Amirouche's theory has not been tested.

Amirouche has not tested his theories that the Press Brake was allegedly defective because its treadle bar was "dangerous and unreliable," and because it did not have a "buffer space" on the ram, a "foot electric/pneumatic switch," or "safety guards of a mechanism/sensory nature. "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert* at 2796. Various Courts have stated that whether the expert's theory has been subjected to the scientific method is "very significant." *See Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002); and *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993).

It is well-settled law that an expert's opinion that a proposed guard would have prevented an accident is inadmissible when the expert has failed to test the proposed guard, construct a prototype of it or even produce drawings of the proposed guard. For example, in *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1084 (8th Cir. 1999), the plaintiff's purported expert sought to testify that the corn head on a combine was unreasonably dangerous because it lacked certain barriers. The court refused to admit the testimony because the expert had not constructed or sketched the suggested device, much less tested it. *Id.* Instead, the expert stated as the basis of his opinion, "I guess as an

engineer I know" what the corn head looked like running. (Similarly, when asked how Petitioner's accident occurred, Amirouche stated that he had an idea of what had happened "in [his] own mind" and that he did his analysis of the accident "in his head.")

Petitioner suggests that the District Court and the Eighth Circuit erred in relying upon *Jaurequi* because in that case, the expert "admitted that he had never observed the corn head at issue ... except from the roadside during his various trips through the Illinois countryside." Petition, pp. 11-12. However, much like that expert, Amirouche has only observed the Press Brake in operation one time (when counsel for Amada America and counsel for Petitioner were also present). Moreover, just like the *Jaurequi* expert, Amirouche was entirely unfamiliar with industry practice regarding guards. Petitioner's suggestion that *Jaurequi* is inapposite is simply incorrect.

Courts have regularly held that untested designs, like those proposed by Amirouche, cannot form the basis of admissible expert opinion as to whether such a design would have prevented a plaintiff's injuries. *See, e.g., Petzmeier v. Hennessy Ind., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (stating that because the expert's "concepts are unfinished and untested ... any testimony from [such expert] about how his proposed design changes would have reduced [the plaintiff's] injuries is wholly speculative"); and *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1250 (M.D. La. 1996) (excluding the opinion of plaintiff's expert that a guard would have prevented plaintiff's injuries because the expert had never tested or reviewed tests of the guard by others but instead merely saw pictures of the product and the guard).

For example, in *Dancy v. Hyster Co.*, 127 F.3d 649, 651-52 (8th Cir. 1997), the Eighth Circuit affirmed the exclusion of an expert's testimony that the forklift used by the plaintiff

should have had a guard, because the expert had not tested his theory, had not designed the guard he was suggesting and had not seen this type of device on other forklifts. Petitioner suggests that *Dancy* is inapposite because the expert in that case had never seen the kind of guard he proposed but rather only "envisioned" it. Petition, p. 12. However, Amirouche also failed to identify even one manufacturer who uses the kinds of guards he suggests. Petitioner's suggestion that the District Court erred in relying on *Dancy* fails in light of these facts common to both Amirouche and the expert in *Dancy*.

Petitioner suggests that the Eighth Circuit decision conflicts with that in *Clark v. Chrysler*, 310 F.3d 461, 466 (6th Cir. 2002) and quotes *Clark* for the general proposition that "Daubert does not require an expert to actually come in and perform tests in every situation." Petition, pp. 13, 15. However, Petitioner's reliance on *Clark* is misplaced. First, this Court recently vacated *Clark* in *Chrysler Corp. v. Clark*, 124 S. Ct. 102 (2003). Vacated opinions are of limited, if any, precedential value. *U.S. v. Saterdalen*, 769 F.2d 494, 496 (8th Cir. 1995). Second, *Clark* is factually distinguishable. The expert in *Clark* had been involved in testing the kinds of latches at issue in the case for over twelve years; he had tested latches in the kind of accident that occurred in the case; and he was familiar with the model latch at issue. 310 F.3d at 468. These facts stand in stark contrast to Amirouche, who has never tested or designed press brakes or guards for press brakes at all, much less on this particular model Press Brake. The different facts in *Clark* and this case confirm that no conflict exists.

b. Amirouche's theory has not been subjected to peer review and publication.

Amirouche has not subjected his opinions or concepts for review by any engineers, manufacturers, or other peer groups. In fact, Amirouche admitted in his deposition that he has not so much as spoken or corresponded with any

"designer, manufacturer or seller of press brakes about this case," nor any expert in the field. Nor does he have any patents on the design of press brakes, guards for press brakes or foot switches for press brakes. While, as the *Stanczyk* Court points out, the closest proxy for peer review is industry practice, *Stanczyk*, 836 F. Supp. at 567, Amirouche has not examined the industry practice regarding guards on press brakes. Because Amirouche's theories have not been subjected to peer review and publication, these theories are not reliable under *Daubert* and Rule 702.

Petitioner suggests that the Eighth Circuit's decision in the present case conflicts with that of the Seventh Circuit in *Smith*, 215 F.3d at 720-21, because *Smith* states that when an expert's opinion and testimony are "based on his extensive practical experience in [the relevant] area, rather than novel methodology subject to publication, his failure to publish does not cast doubt on the reliability of his analytical technique." Petition, pp. 13-14. In other words, *Smith* states that an expert's failure to publish can be overcome if the expert has practical experience in the particular area in question. Such a rule does not help Amirouche. Amirouche has neither published anything relevant to his opinions in this case, *nor* does he have any meaningful experience with press brakes or guards for press brakes. Amirouche's lack of experience *and* publication renders Petitioner's reliance on *Smith* misplaced.

c. There is no known or potential rate of error for Amirouche's theory.

Because Amirouche has not drawn, designed or tested the alternative designs he proposes for the Press Brake, there is no known rate of error. Amirouche's proposed designs, which he admitted remain "in his head," cannot be subjected to any kind of testing until actually produced and installed on the model Press Brake at issue, or at least on a press brake similar to the one at issue. Additionally, Amirouche has not

determined whether his guards would affect the usability and effectiveness of press brakes, or even whether his proposed "block" guard would damage the internal mechanisms of the Press Brake. Courts regularly refuse to admit testimony that fails to consider the effects of a proposed design. *See Jaurequi*, 173 F.3d at 1084; *Peitzmeier*, 97 F.3d at 297; and *Tassin*, 946 F. Supp. at 1250. Because there is simply no way to establish even a potential rate of error, Amirouche's testimony was properly excluded for this reason as well.

d. Amirouche's theory has not been generally accepted.

Amirouche cannot possibly be familiar with whether his proposed guard designs are generally accepted in the industry, because he demonstrated in his deposition to be utterly unfamiliar with the industry in the first place. Instead of demonstrating any proof of general acceptance of Amirouche's theory that certain guards should have been used on this Press Brake, Petitioner claims that such general acceptance is demonstrated by regulations stating that dangers on machines should be guarded. For example, Petitioner points to OSHA regulation 29 C.F.R. 1910.212(a), which states that "one or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area." Petition, pp. 23-24. This endorsement that machines generally should employ guarding fails to support Amirouche's proposal of specific guards for a specific model press brake. The generality of that regulation is emphasized by its inclusion of such hazards as "rotating parts, flying chips, and sparks" (Petition, p. 24), none of which occur with the Press Brake. An OSHA regulation equally applicable to nearly all industrial machines cannot possibly serve as proof of acceptance of Amirouche's particular guards for a specific press brake.

Plaintiff cites *Murphy v. L & J Press Corp.*, 558 F.2d 410, 411 (8th Cir. 1977), as alleged evidence of the general

acceptance of Amirouche's theory. Petition, pp. 22-23. *Murphy* merely states that "failure to provide a safety factor in a machine's design ... can constitute a 'defective condition'...." *Id.* Again, *Murphy* provides no support for Amirouche's particular theories about a specific model press brake. First, *Murphy* does not make anything mandatory, but merely states that "failure to provide a safety factor ... can constitute a 'defective condition...." *Id.* (emphasis added). Moreover, *Murphy* fails to mention the model Press Brake at issue, much less recognize the availability and feasibility of the types of machine guarding advocated by Professor Amirouche. At most, *Murphy* supports the conclusion that the failure to guard machines (generically) may constitute a design defect. *Murphy* does nothing to indicate acceptance of Amirouche's particular theories.[5]

3. Amirouche's opinions have no factual foundation or support but, instead, are based on pure speculation.

It is well-settled law that "[e]xpert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *J.B. Hunt Trans., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001). That is, "opinions of an expert need not be accepted when they are based on nothing more than personal opinion or belief, instead of an understandable scientific basis." *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1393 (W.D. Mo. 1994). Expert testimony is not reliable when it is

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[5] Petitioner's quotation of *Romero v. Cincinnati, Inc.*, 171 F.3d 1091, 1094 (7th Cir. 1999), for the proposition that the failure to provide a "necessary device" can "render a product unreasonably dangerous," similarly does not assist Petitioner's arguments. Petition, p. 14. Like *Murphy*, *Romero* does not say anything about the absence of particular guards from a particular machine. *Romero* likewise does not demonstrate acceptance of Amirouche's theories.

"premised on fundamentally unsound bases or *a fatally deficient amount of data*." *Id.*

Amirouche's opinions rely on exactly that kind of "facially deficient amount of data." Amirouche only spent an hour and a half at the plant where the Press Brake was located, at which time Plaintiff, Plaintiff's counsel, and Amada America's counsel and expert were also present. Amirouche did not operate the Press Brake. Instead, he took a few measurements of the Press Brake and made a rough sketch of the machine. Amirouche recorded his entire "analysis" of the Press Brake from that visit on **one handwritten page of notes**. Amirouche also stated he was "satisfied with what [he'd] done" in preparation for forming his opinion.

Essentially, Amirouche formed his belief that the Press Brake was defective by merely "eyeballing" the Press Brake. "Eyeballing" a product to determine if it is defective does not satisfy the stringent criteria of *Daubert*. *See Diviero*, 919 F. Supp. at 1360 (excluding expert testimony because "in essence he examined the tire, found the belt to be separated and then appeared to leap to the conclusion that it was defective..... This does not meet the mark under Rule 702."); *Dennis v. Pertec Computer Corp.*, 927 F. Supp. 156, 160-61 (D. N.J. 1996) (excluding testimony of expert where his "unrecorded mental methodology amount[ed] to nothing more than unsupported speculation"); *Pomella v. Regency Coach Lines, Ltd.*, 899 F. Supp. 335, 343 (E.D. Mich. 1995) (rejecting an "eyeballing" approach as "unscientific").

Amirouche's review of the case consisted of one brief conversation with Petitioner and conversations with Petitioner's attorney, receipt of certain discovery produced to him by Petitioner's counsel, an Internet search on the subject of press brakes, as well as inspection of the Press Brake for about an hour and a half. That is, essentially all the information Amirouche has relating to the accident is

information conveyed to him by Petitioner's counsel. Instead of such imprecise observation and conjecture, admissible opinion testimony must be based on scientific observations, tests, studies, or experiments. *Chapman*, 297 F.3d at 688. "[T]he absence of any testing indicates that [Amirouche's] proffered opinions cannot fairly be characterized as scientific knowledge. **Personal observation is not a substitute for scientific methodology and is insufficient to satisfy *Daubert's* most significant guidepost.**" *Id.* (emphasis added). Thus, Amirouche's opinions have no factual foundation but instead are based on pure speculation which does not satisfy Rule 702 or *Daubert*.

C. The Eighth Circuit correctly affirmed the District Court's grant of summary judgment in favor of Amada America, and no relevant conflict exists concerning the Eighth Circuit's decision.

After excluding the testimony and opinions of Amirouche, the District Court correctly found that "the record is devoid of any admissible evidence as to the second element [of a design defect claim]—that the press brake was in a defective condition that made it unreasonably dangerous to operate." District Court Order, p. 12.

1. Petitioner was required to produce evidence supporting each element of a design defect claim to withstand summary judgment.

To state a claim for design defect under Missouri law, Petitioner must prove that: (1) Amada America sold the Press Brake in the course of its business; (2) the Press Brake was in a defective condition that made it unreasonably dangerous when put to a reasonably anticipated use; (3) the Press Brake was used in a manner reasonably anticipated; and (4) Petitioner was damaged by the defective condition that existed when the Press Brake was sold. *Rauscher v. General Motors Corp.*, 905 S.W.2d 158, 160 (Mo. Ct. App. 1995). Failure to introduce evidence to establish any one of

these elements is fatal to a design defect claim and warrants summary judgment in favor of the Defendant. *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Because Petitioner failed to introduce any admissible evidence concerning the alleged defective and unreasonably dangerous condition of the Press Brake, the District Court properly granted summary judgment in favor of Amada America.

2. Petitioner failed to produce evidence demonstrating that the Press Brake was unsafe and unreasonably dangerous.

As argued to the District Court and 8th Circuit, Petitioner alleges that the mere fact that the Press Brake lacked certain guards constitutes evidence of a defective condition. *See, e.g.*, Petition, pp. 17, 25 (listing various guards allegedly available for the Press Brake).[6] Petitioner also argues that certain OSHA and ANSI standards, which arguably support the general proposition that *machines generally* should be guarded,[7] provide evidence of the alleged defective and unreasonably dangerous condition of *this particular Press Brake*. Petition, pp. 27-28. However, none of these "facts" satisfy the second element of proving a products liability action under Missouri law.

"Whether a product is unreasonably dangerous is the determinative factor in a design defect case." *Pree v. Brunswick Corp.*, 983 F.2d 863, 865 (8th Cir. 1993). "For

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[6] The record indicates that the Press Brake was indeed equipped with guards. As such, not only is Petitioner's argument without merit, it is also inaccurate and misleading.

[7] These standards do not refer to the Press Brake specifically, and the OSHA regulations do not refer to press brakes at all.

purposes of imposing liability under Missouri's law of strict liability, a product's design is deemed defective when it is shown that the way that the product has been designed renders it unreasonably dangerous." *Pree*, 983 F.2d at 865 (*citing Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986)). A product is defectively designed if it creates an unreasonable risk of danger to the user when put to normal use. *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1153 (8th Cir. 1990).

a. The District Court excluded Petitioner's only evidence on design defect, the testimony and opinions of Amirouche, because it failed the Daubert analysis.

As the District Court correctly noted, the fact that an accident occurred, standing alone, does not establish that a defective and unreasonably dangerous condition existed. *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 571 (Mo. Ct. App. 1977). A finding of defect cannot rest on conjecture or speculation that some defect must exist just because an accident occurred. *Crump v. MacNaught P.T.Y., Ltd.*, 742 S.W.2d 532, 534 (Mo. Ct. App. 1987). Petitioner's accident involved a complex piece of industrial machinery. The District Court held that in such a case involving a complex machine, "[Petitioner] needs competent expert testimony to establish that this press brake is defective and unreasonably dangerous." Order, p. 13. Absent Amirouche's testimony and opinions, the record contains no other admissible evidence concerning an alleged defective and unreasonably dangerous condition of the Press Brake. Accordingly, the District Court did not err in granting summary judgment where Petitioner failed to produce such

"competent expert testimony," or any other evidence of a defect.[8]

b. Evidence of other available guards is irrelevant to the question of whether the Press Brake was unreasonably dangerous.

It is well-settled under Missouri law that "a manufacturer is not obliged to adopt only those features which represent the ultimate in safety or design." *Morrison v. Kubota*

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[8] Petitioner suggests that the failure to produce expert testimony on design defect does not necessarily warrant summary judgment in favor of Amada America, citing *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 416 (3d Cir. 1999), in support. Petition, pp. 27-28. However, in that case the Third Circuit applying Pennsylvania law expressly limited its holding to the facts of that particular case, stating that "*we hold only that on the record before us*, we cannot exclude the possibility that plaintiff's non-expert evidence will be sufficient to submit his claim of defect to the jury." 186 F.3d at 416 (emphasis added). Such "non-expert evidence" included a report from the defendant's engineering manager responsible for the design of the machine in that case "addressing problems with the machine that injured Padillas, including safety concerns." That limited holding cannot be extrapolated to the present case, with its different facts. For instance, Petitioner cites no testimony from anyone at Amada America claiming any safety concerns about the Press Brake (if anything, such evidence has been consistent, that Press Brake is a safe product). Second, the *Padillas* court stated that the product in question was simple enough to be understood by the jury without expert testimony or opinion. *Id.* In contrast, the District Court here specifically held that the Press Brake is a "complex piece of industrial machinery." Petitioner's proffered defect theory is not self evident from just looking at machine – in that it requires admissible expert testimony explaining design, appropriate use for the application at Newco, practicability and feasibility for the Press Brake and whether such proposed design alternations would cause additional injuries or problems. Petitioner, however, offered no such testimony or evidence. The District Court specifically looked at all of the evidence available to Petitioner held that such other evidence was *not* sufficient to establish design defect. *Padillas* is therefore inapplicable to the present case.

Tractor Corp., 891 S.W.2d 422, 426 (Mo. Ct. App. 1994) (holding that the mere availability of a rollover guard did not render a tractor manufactured without one defective); *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 348 (Mo. 1964) (load binder not defective and unreasonably dangerous because it failed to incorporate an available anti-kick-back device). Petitioner's allegations that the Press Brake was not equipped with every available device, even if true, do not satisfy the second element of a design defect claim.

Petitioner again relies upon the argument that certain guard-type devices were available for the Press Brake, and that a failure to guard *may be* a design defect and a jury *may find* the unguarded press brake unreasonably dangerous. Yet Missouri law clearly states that a claim that a manufacturer did not provide every possible safety device does *not* constitute evidence of a design defect. Petitioner was thus left to propose possibilities about what a jury "could" or "might" find but failed to produce any evidence that would have provided a jury with any reasonable basis for such findings. Such a speculative or conjectural claim, unsupported by actual evidence, is exactly the kind of claim summary judgment is intended to resolve. The District Court correctly noted, "The law is not so rigid as to require a manufacturer to sell only those products equipped with every available safety device." Order, p. 12, *citing Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990) (stating that "[a] manufacturer is not obliged to market only one version of a product, that being the very safest design possible."

c. The District Court correctly held that Savage, Petitioner's expert on service procedures, did not provide evidence regarding the question of design defect.

Petitioner also suggests that the opinions of Savage, Petitioner's proffered expert on the applicability of OSHA

and an alleged violation by Amada America of an OSHA standard, provide evidence to withstand summary judgment. Petition, p. 27. The District Court correctly found that that "Savage ...does not provide sufficient expert testimony regarding the allegedly defective condition of the [Press Brake] to save the case from summary judgment." Savage's testimony and opinions have nothing to do with the *design* of the Press Brake. Savage admitted in his deposition that he was offering no opinion regarding the design or manufacture of the Press Brake. Therefore, by his own admission Savage's opinions cannot possibly provide evidence of design defect or an unreasonably dangerous condition created by the *design* of the Press Brake.[9]

d. The OSHA regulations cited by Petitioner, which are not relevant to this case, and the ANSI standard cited, which applies only to press brakes generally, does not provide evidence that this particular Press Brake was defective or unreasonably dangerous.

Finally, Petitioner argues that certain OSHA provisions and ANSI B11.3 provide evidence that this particular Press Brake was defectively designed. First, OSHA does not apply in this case (because Amada America was not Petitioner's employer at the time of the accident). *See McKinnon v. Skil Corp.*, 638 F.2d 270, 275 (1st Cir. 1981); *Prince v. Thomas*, 25 F.Supp.2d 1045, 1049 (N.D. Cal. 1997). Even if they did apply, 29 C.F.R. 1910.147 and 29 C.F.R. 1910.212 say nothing about press brakes, much less this particular model Press Brake. Instead, they address only an employer's responsibility to provide guarding on machines generally.

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[9] (Savage's opinions relate only to the *service procedure* set forth in the service manual. Even Savage admitted that the design of the Press Brake *conformed* with the applicable ANSI standard.)

Similarly, although ANSI B11.3 does pertain to press brakes generally, it does not propose specific guards for specific press brakes, including this Press Brake.

Petitioner reliance on *Murphy*, 558 F.2d at 410-11 and *Duke v. Gulf and Western Mfg. Co.*, 660 S.W.2d 404 (Mo. Ct. App. 1983), for the proposition that these standards are admissible, is misplaced. *Murphy* held that OSHA and other standards may be admissible to demonstrate the *feasibility* of machine guards. *Id.*, 558 F.2d at 411 ("The use of these standards for this limited purpose is clearly admissible...as it relates to the *feasibility* question, i.e., could L & J have feasibly included some form of protective device on the press"). Feasibility was not an issue in this case; the question of whether Amada America *could have* included more guards on the Press Brake has nothing to do with the question of whether the Press Brake was in a defective condition. The availability of other guards is irrelevant to that question. *Morrison*, 891 S.W.2d at 426. These general standards do not constitute evidence of a design defect. Accordingly, the District Court did not err in finding that Petitioner failed to satisfy this element of a design defect claim under Missouri Law.

CONCLUSION

For all of these reasons, Respondent Amada America, Inc. respectfully requests that this Court deny Petitioner Donald Shaffer's Petition for Writ of Certiorari and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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March 18, 2004

(5)

Supreme Court, U.S.
FILED
APR 12 2004
OFFICE OF THE CLERK

No. 03-1170

IN THE

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

v.

AMADA AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SANCTIONS FOR MAKING A FALSE STATEMENT TO THE COURT AND FOR LEAVE TO SUPPLEMENT THE RECORD

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I. INTRODUCTION

Respondent Amada America, Inc. ("Amada America") respectfully requests that the Court deny Petitioner Donald Shaffer's ("Petitioner") motion for sanctions for making a false statement to the Court and for leave to supplement the record. On February 10, 2004, Petitioner filed his Petition for Writ of Certiorari. On March 16th, Amada America timely filed its Brief in Opposition to Petition for Writ of Certiorari ("Amada America's Brief").

Petitioner's motion for sanctions should be denied because the statement for which Petitioner seeks such sanctions is true and supported by the record in this case. Petitioner's motion refers to footnote 6 on page 25 of Amada America's Brief, which states that the press brake at issue in this case (the "Press Brake")[1] was equipped with guards. As was done during his briefing in the District Court, Eighth Circuit, and now in this Court, Petitioner made overbroad statements that are not supported by the evidence. The statement in Petitioner's brief that " . . . the machine was not equipped with any type of guard . . .," is not accurate. This industrial Press Brake, which was installed by Petitioner in 1999, did have guards.

Nowhere in any of the briefs filed in the District Court, Eighth Circuit, and now in this Court, has Amada America contended that Petitioner's expert's proposed alternative designs were on the Press Brake at the time of accident. Had there been such a contention, the evidence and briefing would have been different in the District Court, Eighth Circuit, and this Court. But to claim, as Petitioner has done, that a new industrial Press Brake installed approximately one year prior to Petitioner's accident was not equipped "with any type of guard" is misleading and inaccurate. For example, as recited below, the testimony of Peter J. Schwalje (Amada America's

[1] Petitioner bases his products liability claims in this lawsuit on injuries he sustained in an accident which occurred while he was servicing the Press Brake.

expert witness) and testimony by Mark Herbert support the statement that this one year old Press Brake had a guard. Accordingly, to say that there was no guard on the Press Brake is not correct, but rather what Petitioner is and has contended is that the Press Brake is allegedly defective because it did not have the proposed alternative designs on the machine suggested by his expert. Petitioner's contentions of defect were addressed in the briefing to the District Court, Eighth Circuit, and this Court. However, a true and accurate statement supported by the record does not constitute an intentionally deceptive or misrepresentative conduct for which sanctions can be imposed. Petitioner has not demonstrated that sanctions are warranted for a statement that is not false or misleading.

Petitioner's motion for leave to supplement the record should also be denied. Petitioner seeks leave to supplement the record with an advertisement for the sale of a foot switch for press brakes sold by Amada America. However, the information set out in the advertisement is, at best, merely cumulative of evidence already contained in the record. Moreover, for some time Petitioner has had within his possession the very kind of evidence that foot switches like the one in the advertisement were available for the Press Brake. Specifically, (1) Petitioner testified that he offered Newco the opportunity to purchase a foot switch prior to his accident, (2) Amada America's employees testified about the availability of an electric foot switch for the Press Brake, and (3) on September 27, 2002, Amada America produced in discovery to Petitioner's counsel a document entitled "Retrofit Accessories Catalog" which has a picture of the electric foot switch with the same description Petitioner is now attempting to supplement the record. Because the advertisement is merely cumulative of evidence already submitted, this Court should deny Petitioner's motion for leave to supplement the record.

II. ARGUMENT

A. Amada America has made no false or misleading statement.

Petitioner's suggestion that Amada America has made a false or misleading statement to the Court is incorrect and misconstrues the plain language of Amada America's brief. Petitioner's motion refers to footnote 6 on page 25 of Amada America's Brief, which states as follows: "The record indicates that the Press Brake was indeed equipped with guards. As such, not only is Petitioner's argument without merit, it is also inaccurate and misleading." Brief in Opposition to Petition for Writ of Certiorari, p. 25. Footnote 6 of Amada America's Brief is a shortened version of footnote 5 from Amada America's Brief before the Eighth Circuit Court of Appeals. Footnote 5 of that brief stated, in its entirety,

> Plaintiff notes this practice [the practice of adjusting the Press Brake's lower beam so that it would not open far enough to allow a person's fingers to enter the space between the die and the lower beam of the Press Brake] in his brief (p. 11) but then makes the inconsistent claim that 'the machine was not equipped with any type of guard.' (p. 9). As Amada America's expert, Peter J. Schwalje ("Schwalje"), noted, this practice of limiting the space between the die and the beam was in itself a type of guard for the Press Brake. App. 435.

Amada America's Appellee's Brief, p. 6.

Both footnotes are accurate in that the record reflects the practice with the Press Brake was to limit the space between the die and the ram, and such practice constituted a guard for the Press Brake. As footnote 5 of Amada America's Brief notes, Mr. Schwalje testified in his deposition that the Press Brake's die and ram were customarily set by the user of the Press Brake such that they would not open more than one-sixteenth of an inch. *See* Deposition of Peter J. Schwalje, 62:12-64:7 (referred to in footnote 5 above as "App. 435"), attached hereto as **Exhibit A**. Mr. Schwalje further testified in his deposition that this limitation on the opening between the die and the ram constituted "the most obvious" guarding system for the Press Brake. *See*

Deposition of Peter J. Schwalje, 77:24-78:20, attached hereto as **Exhibit B**. (Petitioner himself also acknowledged that the Press Brake's user customarily "adjust[ed] the lower beam so that it would not open far enough to allow a person's fingers to enter the space between the die and the lower beam," citing the deposition testimony of Mark Herbert. *See* Petitioner's Appellant's Brief, p. 7.)

Amada America included footnote 6 in its Brief (and its predecessor, footnote 5, in its Appellee's Brief) because Petitioner, throughout the various stages of this litigation, has made overbroad statements that the Press Brake was not equipped with any kind of guard. *See, e.g.*, Petitioner's Appellant's Brief, p. 9 ("As the machine was not equipped with any kind of guard...."); Petitioner's Petition for Rehearing or Rehearing En Banc, p. 10 (same); Petitioner's Petition for Writ of Certiorari, p. 6; and Petitioner's Motion, "Statement of Case" [2] (same). In 1999, this industrial Press Brake was installed new by Petitioner. It was an expensive industrial Press Brake. To say, as Petitioner has done, that the Press Brake had no guards is incorrect.

Petitioner seems to imply in his motion that Amada America is arguing that there is an issue of whether the alternative guard designs proposed by his expert were in fact on the machine at the time of the accident. At no point in any brief filed in the District Court, Eighth Circuit, or this Court has Amada America ever claimed that the Press Brake Petitioner was servicing at the time of his accident was equipped with the kinds of alternative guard designs proposed by Petitioner's expert witness, nor can footnote 6 of Amada America's Brief possibly be construed to suggest as much. The issues analyzed by the District Court and Eighth Circuit concerning guarding involved the admissibility of Petitioner's expert's testimony, including his proposed alternative designs, and the granting of summary judgment based on Petitioner's failure to

[2] The pages in Petitioner's Motion are not numbered.

establish a defect or that a defect caused his accident. Had there been a dispute of whether the guards suggested by Petitioner's expert were on the Press Brake at the time of the accident, the briefing in the District Court, Eighth Circuit, and this Court certainly would have been different. Petitioner's attempt to raise non-issue is unfortunate, but not supportive of any sanctions being imposed. Amada America included footnote 6 to address Petitioner's overbroad statement that the Press Brake had no guards whatsoever. Petitioner's inaccuracy is contradicted by both Schwalje's testimony and by Petitioner's own admission concerning the limitation on the space between the die and the ram. Footnote 6 of Amada America's Brief cannot be considered an intentional misstatement, especially given the fact that the statement is supported by the testimony and briefing in this case. For these reasons, Amada America respectfully requests that the Court deny Petitioner's motion for sanctions.

B. Petitioner has failed to demonstrate a compelling reason to permit him to supplement the record.

Petitioner has failed to demonstrate any reason for granting his motion for leave to supplement the record. Petitioner seeks to supplement the record with an advertisement from Amada America's website for a foot switch for press brakes because he alleges that "to the best of Petitioner's knowledge, [the advertisement] did not exist at the time of filing of the Petition for Writ of Certiorari … and if it did in fact exist, it was not known to counsel." *See* Petitioner's Motion, "Purpose of the Motion." However, the advertisement has, in fact, long been available to Petitioner, including that the information contained in the advertisement was produced to Petitioner in discovery over a year and half ago.

Petitioner is simply incorrect in stating that the advertisement did not exist at the time he filed his Petition for Writ of Certiorari. The advertisement Petitioner seeks to include in the record has been posted on Amada America's website since at least May 28, 2002. The

advertisement therefore has been available to Petitioner for his inclusion in the record for nearly two years. Moreover, on September 27, 2002, Amada America produced to Petitioner in response to discovery, inter alia, a document generated by Petitioner's employer at the time of the accident [Amada Engineering & Service Co.] entitled "Retrofit Accessories Catalog for Amada Machines" (attached hereto as **Exhibit C**). That document has a picture of a foot switch and uses the same language noted by Petitioner in the advertisement that he is now requesting to supplement the record. *See* Exhibit C at p. AA0497.)

Finally, the existence of such a foot switch is certainly not new information to Petitioner. Petitioner has known that Amada America offered (and still offers) for sale foot switches like the one in the advertisement. The testimony by Petitioner, Amada America's employees and expert have been consistent that although the Press Brake did not have an electric foot switch on it at the time of the accident, one could have been placed on the machine instead of a treadle bar. For example, Petitioner, who is the one who actually installed the Press Brake at Newco in 1999, testified that he suggested to Newco that it put a foot switch on the Press Brake prior to the time of his accident. *See* Petitioner's Depo. at pp. 140-142 (attached as **Exhibit D**).

As the District Court noted in its opinion granting summary judgment, the testimony of Amada America's employees did "establish that Amada offered some extra guarding devices at the time the [Press Brake] was sold to Newco, but [such testimony] does not follow from this evidence that the [Press Brake] is defective without these devices or that they would have prevented the accident that occurred here." *See* District Court's Order granting summary judgment (Exhibit to Petitioner's Motion at p. 15).

The advertisement Petitioner seeks to include in the record now establishes, at most, that a foot switch was and is available for the Press Brake. As such, this cumulative evidence

establishes nothing new. Petitioner implicitly acknowledges as much when he states that inclusion of the advertisement in the record would "*further* support plaintiff's position that the safety devises [sic] identified by Professor Amirouche are widely accepted in the industry." *See* Petitioner's Motion, "Reasons to Allow Motion to Supplement the Record" (emphasis added).

Petitioner's motion therefore fails to demonstrate any compelling reason to grant leave to supplement the record with cumulative evidence because (1) Petitioner testified that he offered Newco the opportunity to purchase a foot switch prior to his accident, (2) Amada America's employees testified about the availability of an electric foot switch for the Press Brake, and (3) on September 27, 2002, Amada America produced in discovery to Petitioner's counsel a document entitled "Retrofit Accessories Catalog" which has a picture of the electric foot switch with the same description Petitioner is now attempting to supplement the record. Because the advertisement is merely cumulative of evidence already submitted, the Court should deny Petitioner's motion for leave to supplement the record.

III. CONCLUSION

For all of the reasons stated herein, Respondent Amada America, Inc. respectfully requests that the Court deny Petitioner Donald Shaffer's Motion for Sanctions and for Leave to Supplement the Record, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

By _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by U.S. Mail, first class mail postage prepaid, this 12th day of April, 2004 to William J. Meacham, 521 St. Louis Street, Edwardsville, Illinois 62025.

_____

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

CIVIL ACTION NO. 4:01-CV-01767-CDP

- - -

DONALD SHAFFER, :

Plaintiff, :

:

-vs- :

:

AMADA AMERICA, INC., :

Defendant. :

- - -

DEPOSITION UNDER ORAL EXAMINATION OF

PETER J. SCHWALJE, P.E.

EDISON, NEW JERSEY 08817

SEPTEMBER 24, 2002

- - -

REPORTED BY: SILVIA PEREZ WAGE, CSR

- - -

JOB NO. 21445

EXHIBIT A

Q. Right.
A. Normally, the dies should ascend until a point where the upper and lower die halves come together and create the proper tonnage to produce the given bend, which for our practical purposes is like a closure.
Q. Okay. Do you have any knowledge as to what the machine was set on the day of Mr. Shaffer's injury, as far as the stroke?
A. Specifically, no.
I can make a very reasonable assumption.
Q. Okay.
A. That it was set for the dies to close on the size piece that they were working prior to him being summoned to the machine.
As I understand the circumstances, he was asked to come over and look at the machine, which had been in production. And so I would make the logical assumption that the dies were set to reach a closure point; in other words, when they went to the maximum up position, there wouldn't have been clearance or anything.
Q. Do you know or has anyone indicated what -- I was wondering if anyone from Newco had told you what they actually do with this particular press brake?

A. Let me answer your question this way.
Nobody from Newco told me, specifically. My understanding is that this press is used as a general purpose machine and they manufactured basically coffee makers and alike and they use it to bend the sheet metal that forms components of that assembly.
Remember we went to the back room there. They had all their coffee pots laid out when we were done.
Q. Okay. So based on your understanding, do you have any idea how thick this sheet metal would be that Newco generally bends?
A. Yeah, I would say it's not plate. It's relatively thin.
Q. Can you define relatively thin?
A. Well, maybe 16 gauge.
Q. How thick is that in terms of 16th of an inch?
A. You got to remember the Birmingham Wire Gauge numbers. Off the top of my head, I would say it's probably in the order of a 16th of inch, .003 seconds maybe.
Q. So would it be reasonable to believe that the die -- at the time of Mr. Shaffer's injury

the stroke was probably set to either touch the die or be within 16th of an inch of the die or so?
A. The upper part, yeah.
Q. The upper stroke?
A. Upper travel limit; very reasonable.
Q. What is your understanding of the job -- the process that Mr. Shaffer was attempting to do relative to this press brake at the time of his injury?
A. Well, I guess you would derive that from a couple of places. Of course, his deposition testimony has set forth what he was doing. There was Herbert, the guy that was standing to the right -- to the rear of him watching the procedure. Of course, there is some service -- prior service orders or records that speak to this machine, and if I take it a step further, I know where in the parts manual all these parts are that relate to that. So one assimilates all of those, that would form my understanding of what he was attempting to do.
Q. What was he attempting to do?
A. He was attempting to analyze a problem, which purportedly was that the lower limits setting for the beam would not hold his position and it would either drift or overshoot what would be the lower setting.
Q. Does that mean in plain English that when

the ram which travels upward to contact the dies to bend the metal drops back down, that it was dropping down lower than the people at Newco wanted it to stop -- at a point lower than they wanted to stop; is that correct?
A. I take umbrage I didn't use plain English. I thought it was pretty plain.
Q. Well, it was very plain for people who are familiar with machinery, but it might not be for people in the world who are not.
A. Well, you lose specificity when you oversimplify it.
But the beam has the capability of having an upper limit and lower limit on this travel. There was no problem with where it was going at the upper point. When you released the activation device and the beam would go to its lower position or its rest position, it apparently was dropping below the set point that they wish to have, and that was the problem that Mr. Shaffer was investigating.
Q. Okay. Have you done any analysis of that problem to determine to your own satisfaction what might have caused it to cause that beam to go to a lower position, lower than they wanted to, not stay at the properly set position?

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

CIVIL ACTION NO. 4:01-CV-01767-CDP

- - -

DONALD SHAFFER, :

Plaintiff, :

:

-vs- :

:

AMADA AMERICA, INC., :

Defendant. :

- - -

DEPOSITION UNDER ORAL EXAMINATION OF

PETER J. SCHWALJE, P.E.

EDISON, NEW JERSEY 08817

SEPTEMBER 24, 2002

- - -

REPORTED BY: SILVIA PEREZ WAGE, CSR

- - -

JOB NO. 21445

EXHIBIT B

very precisely cause incremental motion of that without having to depend on using your foot on the treadle bar to reach a position.

Q. So by dialing the manual pulse generator, one would raise and lower the ram and that is how one would -- and when one -- and when the individual lowering the ram or adjusting the bottom position of the ram, how do they lock it into --

A. When you get it into position, you bring it up and lock it into position.

Q. That would be the lever --

THE STENOGRAPHER: You're talking over one another and it's hard.

Please repeat your question.

(There is a discussion off the record.)

BY MR. MEACHAM:

Q. So if an individual was utilizing the manual pulse generator to set the bottom position of the lower beam, that individual would turn the manual pulse setter and lower the beam to the desired position and then would lock the beam in the bottom position by use of the lever, which you previously circled on the left side of the machine; is that right?

A. You'd lock your setting by virtue of using the lever shown in P-7 for identification.

Q. Okay. Mr. Shaffer, as I understand -- what is your understanding of what Mr. Shaffer was doing?

A. Mr. Shaffer was not concerned with the actual position of that lower beam but was concerned with the mechanism which held -- set and held the position. He was looking in the area of these vertical plates to see or ascertain how that mechanism was functioning.

Q. Those being vertical plates which you discussed earlier being part of the breaking mechanism?

A. Correct.

I'm sorry, part of the what?

Q. Interlocking mechanism or --

A. Not the breaking --

Q. Right, the locking mechanism.

And so in order to observe the operation of the machine or whatever, what was he actually doing with the machine, what's your understanding of what he was actually doing?

A. He would depress the foot treadle, cause the beam to rise up to the almost closure point, release the pressure, allow it to descend, then he would engage the lock, and he wanted to determine if it would hold that position or would not hold that position.

Q. And is it your understanding that -- or do you have an understanding of whether the beam was holding its position at that time?

A. Well, the -- well, I can only tell you what was in the depo testimony; wasn't there at the time.

Q. Right.

A. Apparently, the people at the plant thought it was drifting from that position.

In his testimony, I didn't recall or I don't recall him stating whether he found that to be true or not.

Q. Okay.

A. Mr. Meacham, you want your pen back?

Q. Thank you.

On Page 5 of your report, next to the last paragraph, fourth full paragraph you discuss the many different configurations of dies, et cetera; is that -- as I understand it, your opinion is that the brake manufacturer cannot possibly anticipate the tooling that would be installed in the brake as a part of the many metal forming systems in which the brake may be employed?

A. Correct.

Q. What significance does that have, different tools or dies that might be used on the brake, what's significance does that have with regard to machine guarding?

A. Because without the knowledge of the tooling, you don't know the parts that's going to be formed, its configuration, and without that knowledge, you can't provide an effective safeguard.

Q. Have you learned anything -- have you learned what types of dies or tooling they used at Newco on this particular press brake?

MR. PESCE: Just so I'm clear, are you talking on the day of the accident or on the day of the inspection or both?

MR. MEACHAM: Well, on the day of the accident and then prior thereto.

A. No, I made no inquiry.

Q. Okay. Have you done any specific testing to determine what types of guarding may have been used on this particular machine?

A. I don't understand that question.

Q. Have you --

A. I don't know what kind of tests you would envision being performed.

Q. Well, I don't either.

A. That's why I didn't understand your question.

Q. Have you -- did you study any feasible guarding systems that might have been utilized on this

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machine?
A. I would say, yes.
Q. Okay. What?
A. Well, the most obvious one would be the fact that this press brake provides you the ability to limit the total strokes of the machine.
If I'm performing operations on a relatively light gauge sheet metal material and I'm producing very small bends on that material, I can set the opening and closure of the die space to a quarter-inch or less and safeguard that particular operation simply by that adjustment mechanism.
If I am to perform other types of operations, I'd have to evaluate what I'm doing and what role the operator is playing, all the facts that are items that would go into that particular setup to make that next determination. There's multiple types of safeguarding devices which could have applicability to the machine.
Q. Can you set forth for me what types of safeguards might have applicability to this machine?
A. It is -- in some instances one could use a barrier guard that is fixed; one can use die guards that are fixed to the dies. You could use fixtures

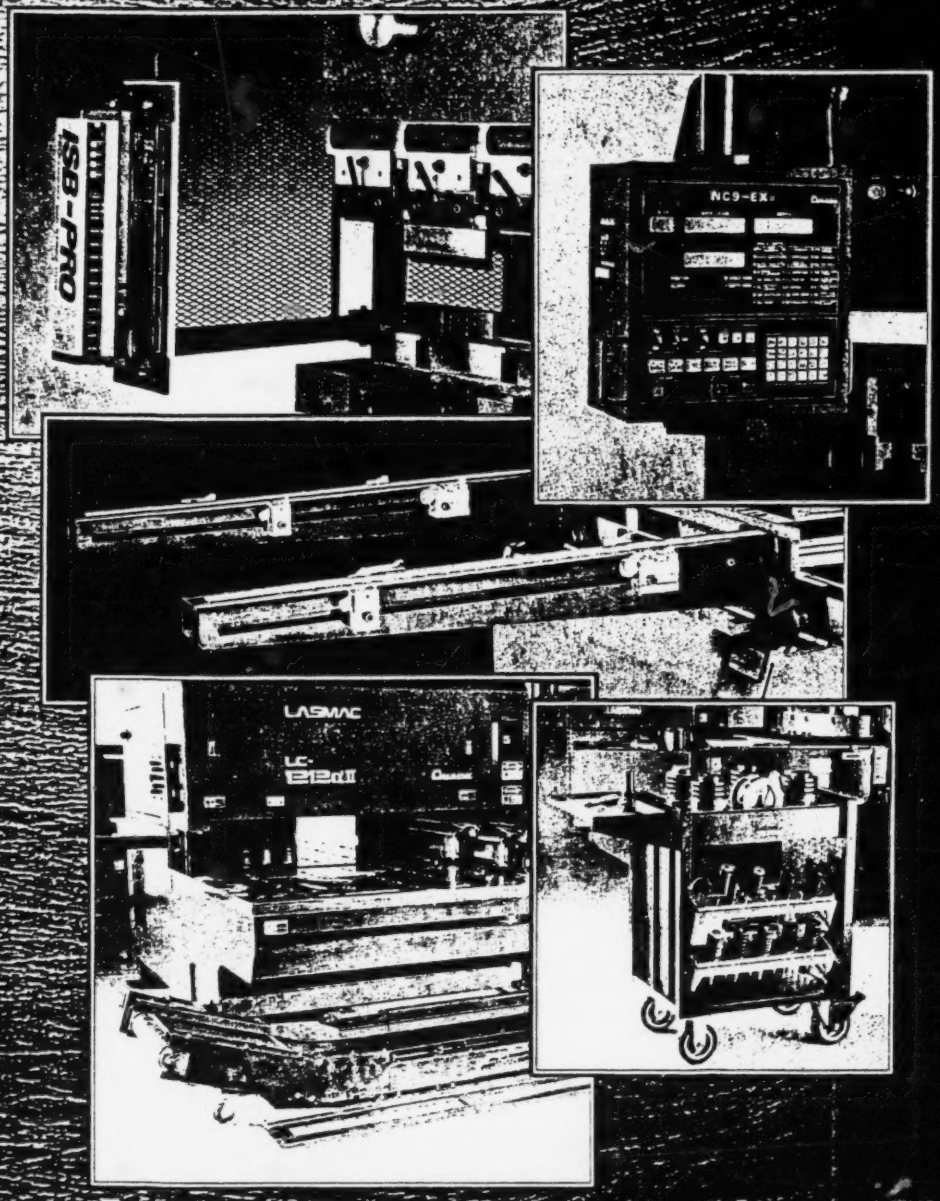
which introduce and remove the material from the die space without the operator having to hold the piece while the inserting is going on of the removal. You can use restraint devices which limit the forward motion of the operator's hands. You could use a pullback mechanism working off an overhead mechanism to force the operator's hands back from the point of operation. You could use forms of present sensing devices such as photoelectric or -- well, we're getting away from RF, radio frequency devices.
Q. As a present sensing device, is that something that's commonly called a light curtain?
A. That's a generic name, yes.
Q. How does that work?
A. It establishes an energy beam, which is in a spectrum normally away from visible light or incandescent light, and establishes in essence a field which projects across the front portion of the machine. The field will sense an interruption. It will send you a signal to a control device and that will inhibit motion.
Q. Would there have been in your opinion any reason why a present sensing device could not be utilized to safeguard the machine during the operation that Mr. Shaffer was performing at the time of his

injury?
A. Well, Mr. Shaffer wasn't operating the machine. He was doing a service function.
Based on the operation that was being performed, it would be unlikely that a light curtain or present sensing device would be applicable to the specific processes that they were performing.
Q. What specific processing would that be?
A. Well, they -- producing portions of coffee pots. They were using multiple flange bending operations to produce parts.
If you recall, the individual immediately to the left of the machine was there performing multiple operations with multiple flanges. That interposes the part within the field and would not allow you to perform the operation with that type of safeguard.
And if you refer to Industrial Data Sheet 419, that is specifically one of the very operations that limits the present sensing device applicability. It says, specifically, will not allow for multiple flange bending operations, which is precisely the principal operation I've seen them performing there.
Q. Would the operation that they were performing there interfere with the ability to have a fixed guard?

A. Probably, yes.
Q. Did you analyze the operation to determine whether or not some type of fixed barrier could be utilized?
A. No.
Q. Is there a reason why you didn't analyze that operation?
A. Is there a specific reason why?
Q. Yes.
A. There was no specific reason.
I would say I did not do it for the fact that basically I was concerning myself with the design issues of this machine, and since it's very well recognized and known that those types of analysis and decision making process lies with the employer, their system assembler, that would be Newco's responsibility.
Q. Would the operation that was the type of bending operations that Newco had performed that you had described here, would the use of restraint device have hindered that operation in your opinion?
A. Probably not.
Q. Okay. How about pullback devices, would they interfere with the Newco operation as you described it?
A. I would think not.

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1-800-247-8366

EXHIBIT C



ESi

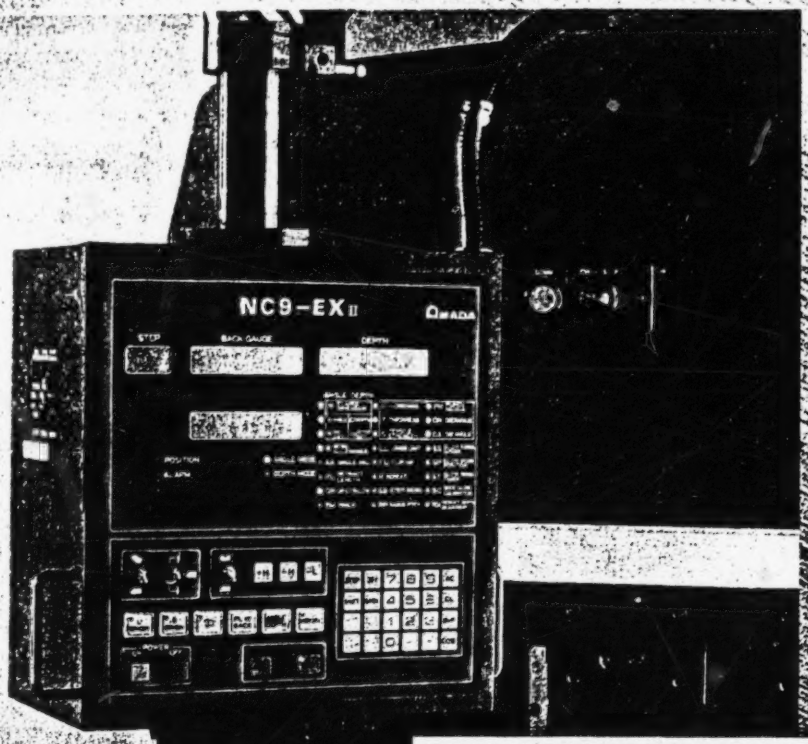
RETROFIT ACCESSORIES CATALOG FOR AMADA MACHINES

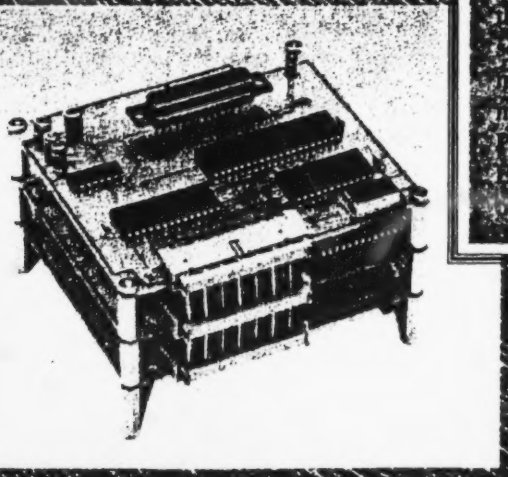
EXHIBIT C

AA 0495

PRESS BRAKE ACCESSORIES

ONE, TWO AND THREE AXES BACKGAUGES

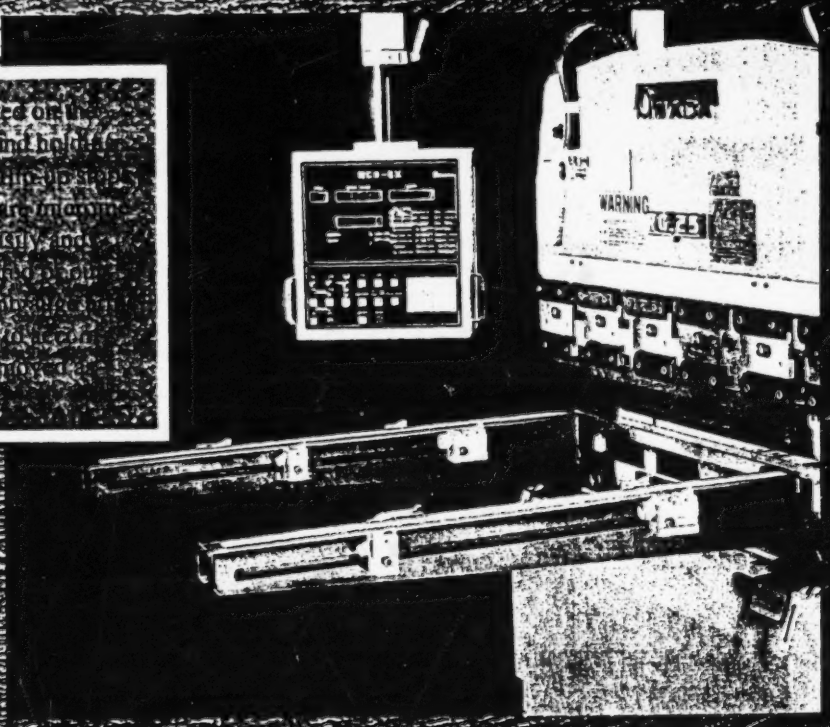




AA 0496

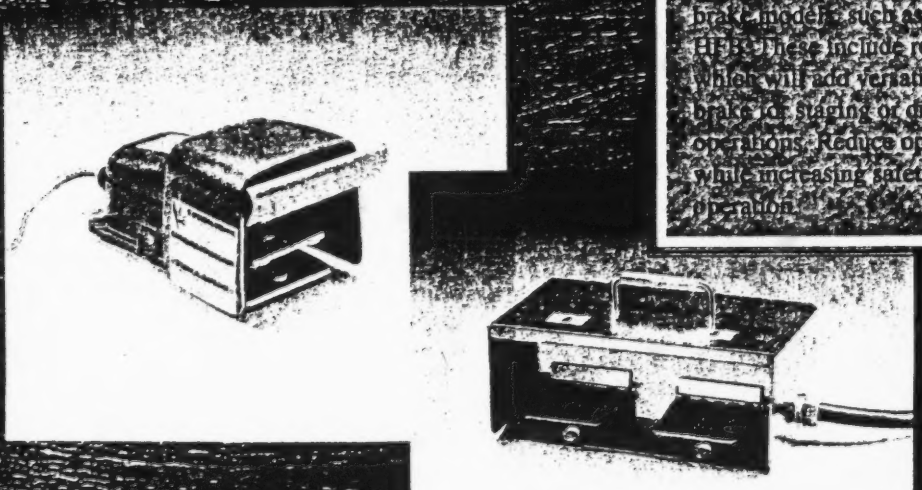
FRONTGAUGE RR ARMS

The frontgauge is mounted on the lower table for positioning and holding workpieces. A variety of tooling options are provided. Two of these are memory type allowing operators to easily and accurately locate workpieces. Each of these options can be positioned vertically to clear tooling and workpieces.



FOOT SWITCHES

Amada Engineering provides a full line of foot switches for all press brake models, such as RG, EBD and HFB. These include retrofit switches which will add versatility to your press brake for staging or dual operation operations. Reduce operator fatigue while increasing safety of the bending operation.



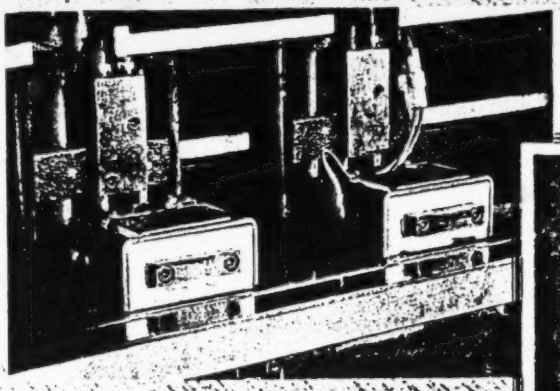
PRESS BRAKE ACCESSORIES

AA 0497

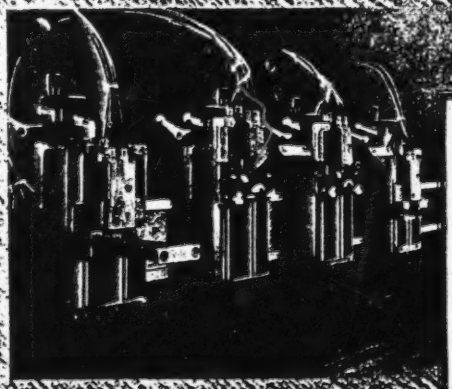
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AMADA ENGINEERING & SERVICE CO., INC.

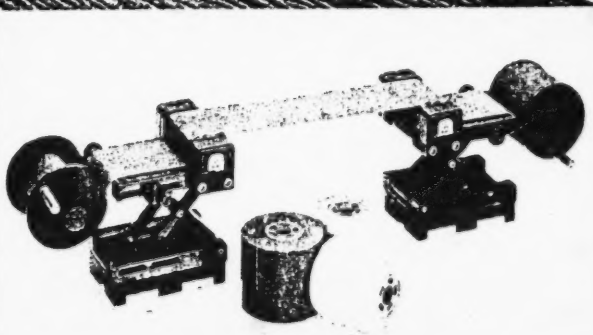
ELECTROMAGNETIC FINGERS



FLIP FINGER ASSEMBLY



MARKLESS MATERIAL PROTECTION SYSTEM



ISB Programmable Light Curtain

The ISB Programmable Beam plate-mounted light curtain is a productive safety solution for Amada press brakes. Amada ISB light curtains provide optimum safety with minimum production interruption. The intelligent control system of the operator allows the workpiece profile to determine which beams are activated. Safety no longer has to come at the expense of productivity.

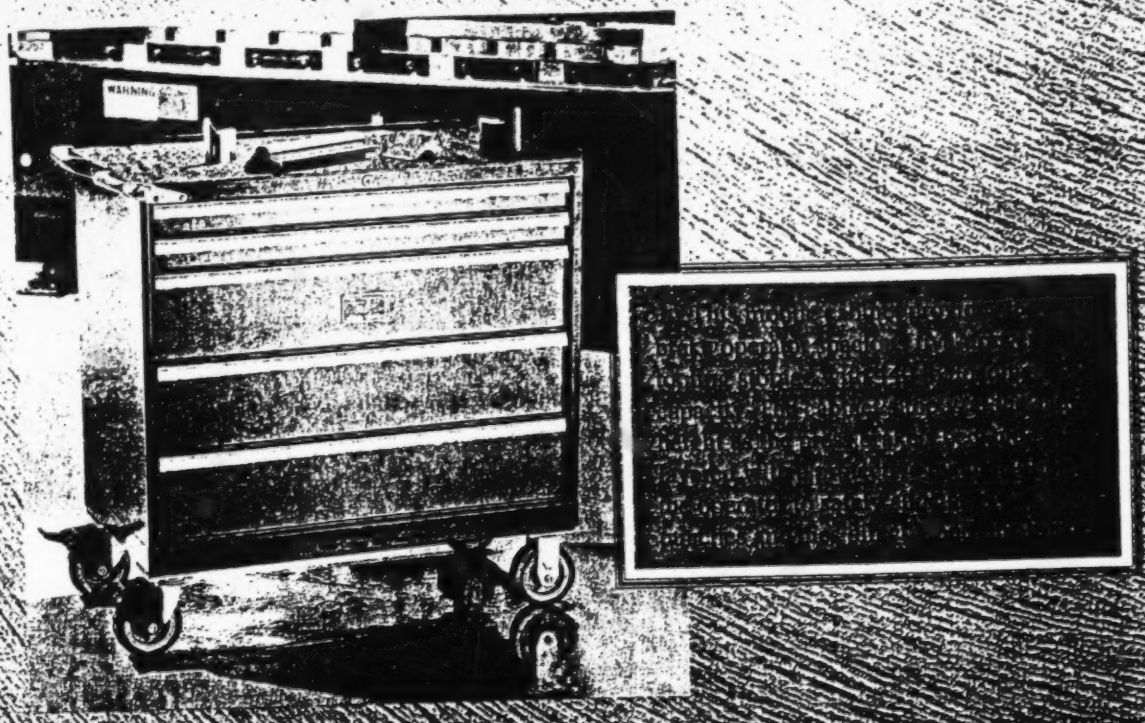
Dual Palm Buttons

Press Brake Safety

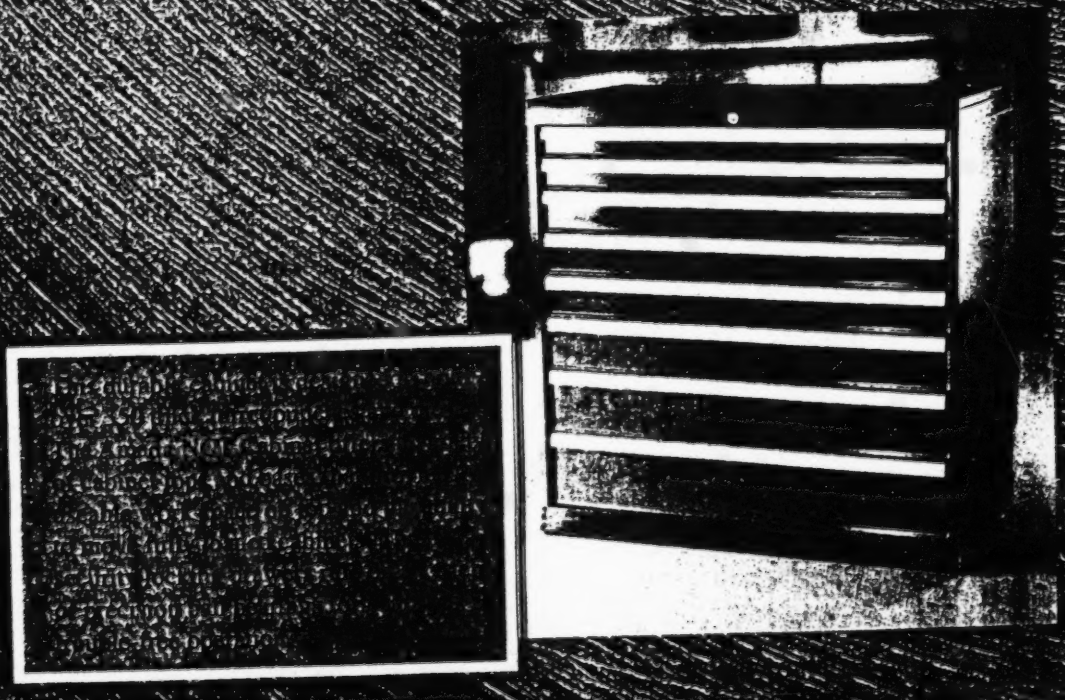
AA 0499

Amada Engineering & Service Co., Inc.
Phone 800 854 3567

MOBILE BRAKE TOOLING CABINET

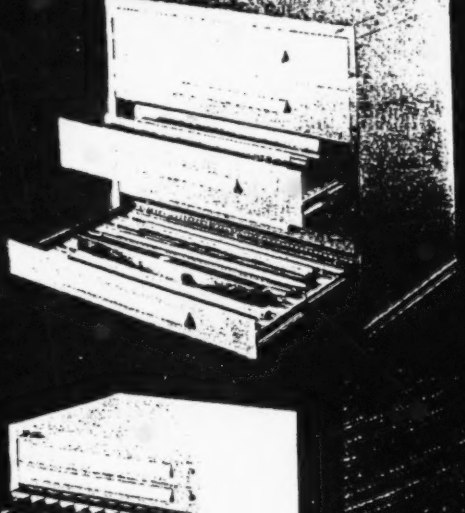


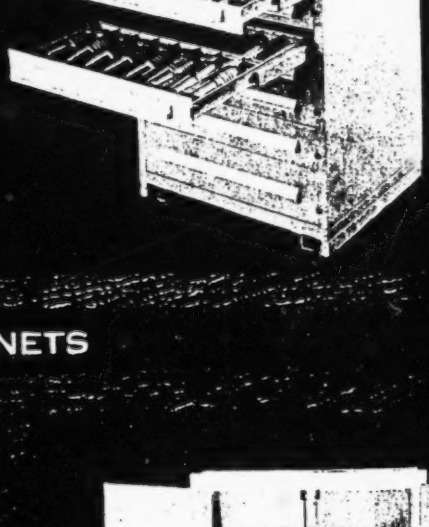
NCT TOOL CABINET



AA 0500

DRAWER CABINETS

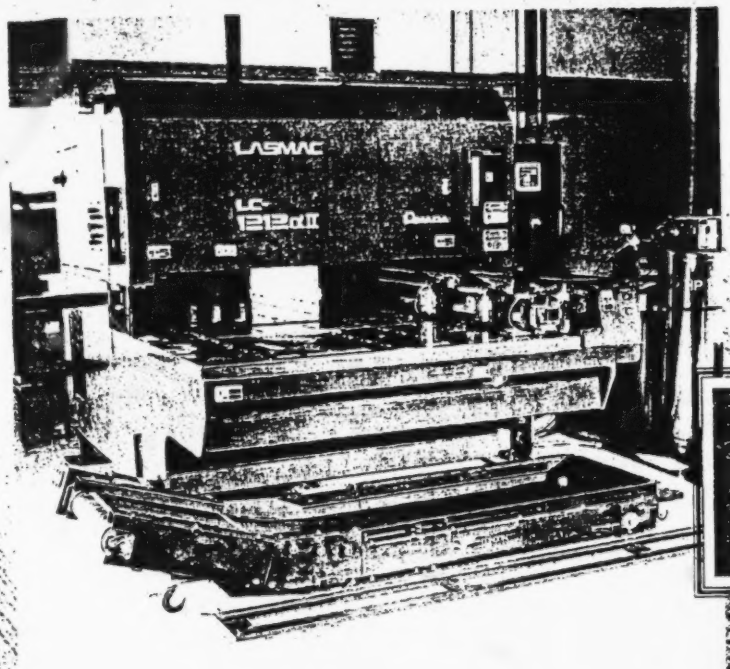




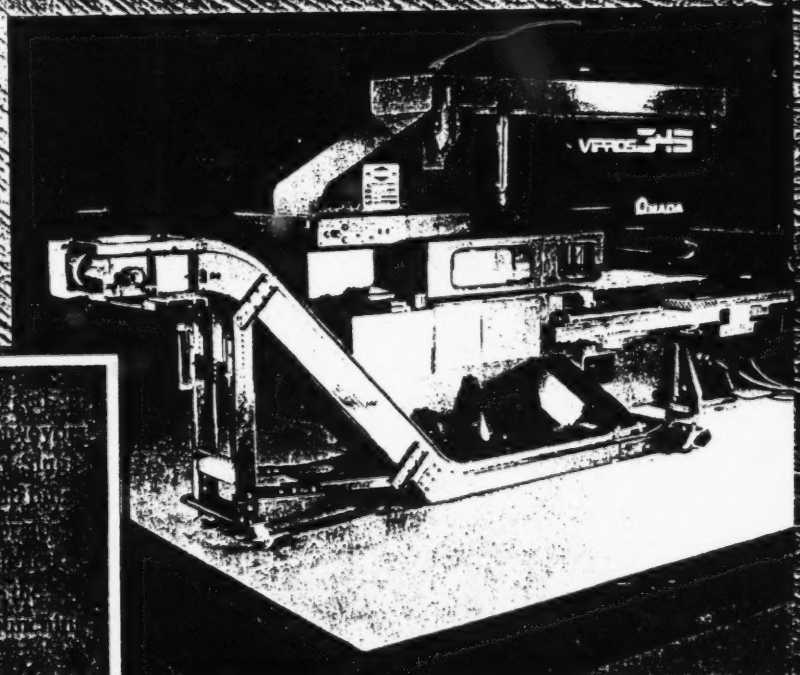
ROTARY CABINETS

AMADA ENGINEERING
& SERVICE CO., INC.
PHONE: 800 854 3567

LASER CONVEYORS

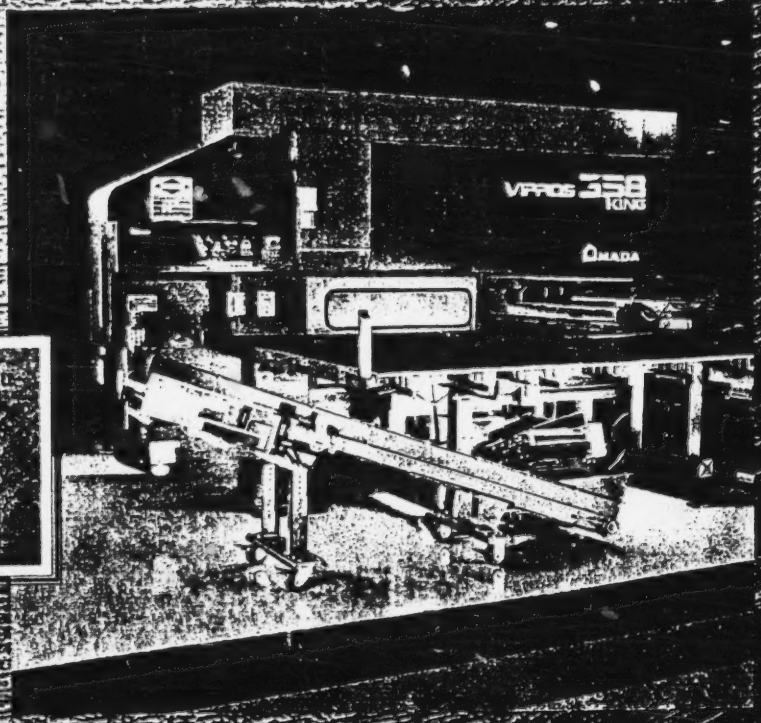


PEGA, COMA, VELA CONVEYORS



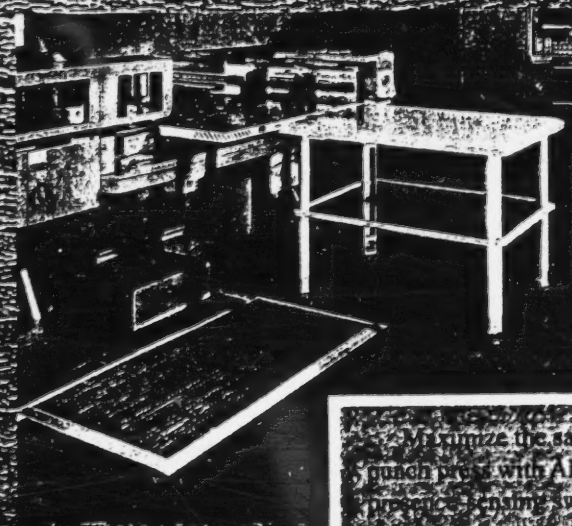
AA 0502

VIPROS CONVEYORS



The fastest, most accurate hydraulic machines in the industry don't need to be slowed down by scrap removal problems. AESI has conveyors to keep up with all of Amada's state-of-the-art Vipros models.

SUBTABLES AND SAFETY MATS



[illegible] the work [illegible] punch press with [illegible] mobile support tables. Subtables keep larger sheets from bending or jamming the punch [illegible] can service a [illegible] requiring a single operator.

Maximize the safety around your turret punch press with AESI's safety mats. These presence sensing switchmats provide effective safety barriers to both workers and vehicles entering hazardous or restricted machine and production areas. AESI offers a wide variety of sizes and configurations to fit your machine and safety requirements.

PUNCH PRESS ACCESSORIES

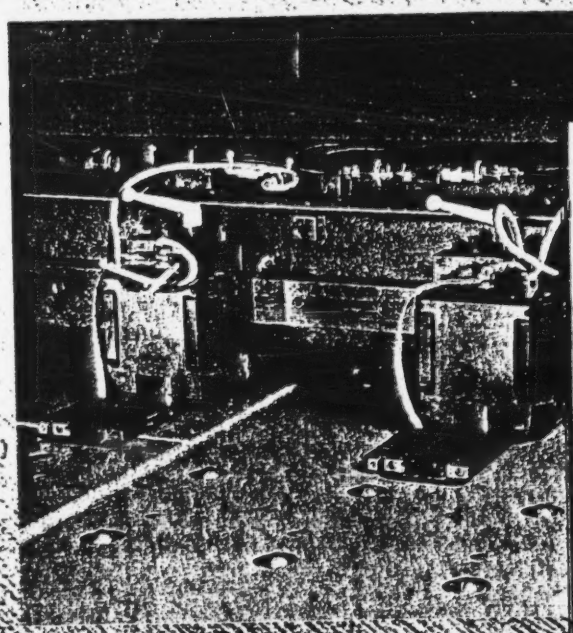
CONVEYORS

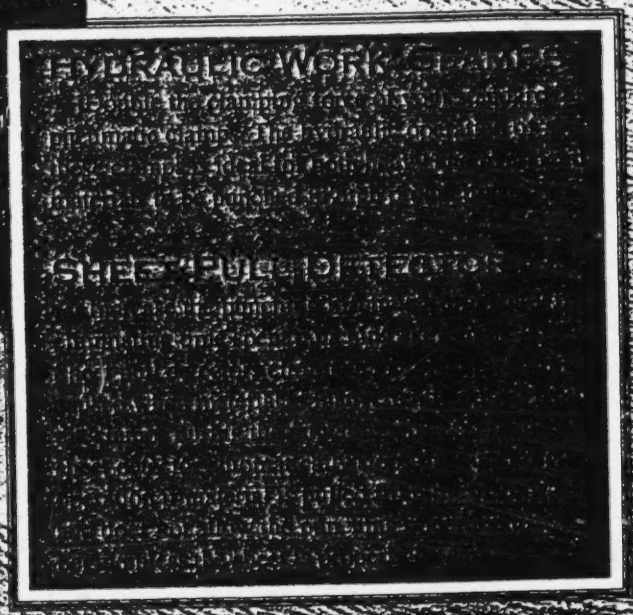
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AMADA ENGINEERING & SERVICE CO., INC.

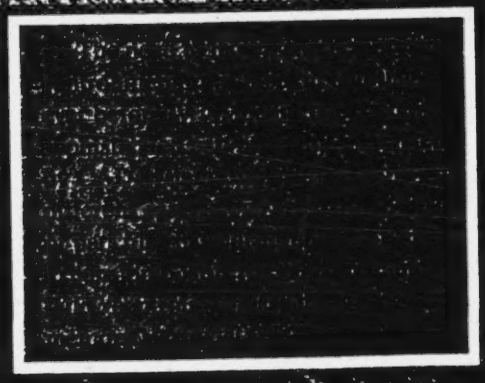
PUNCH PRESS ACCESSORIES

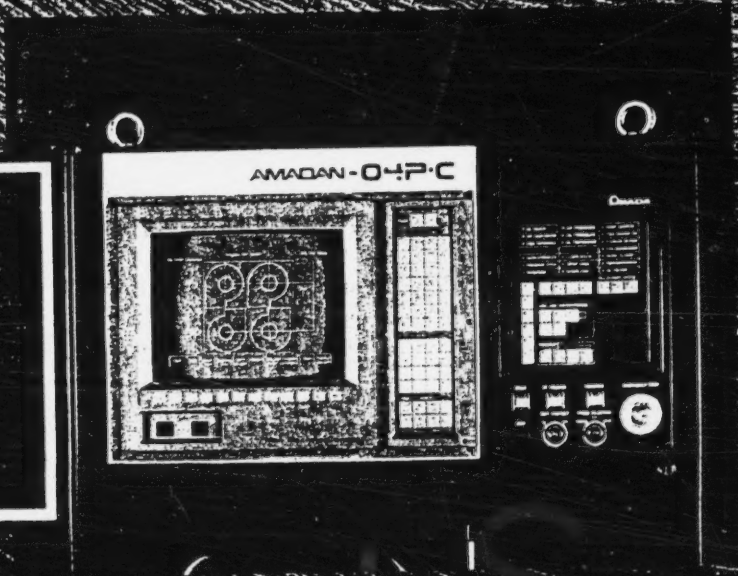
WORKCLAMPS AND SHEET PULL DETECTOR



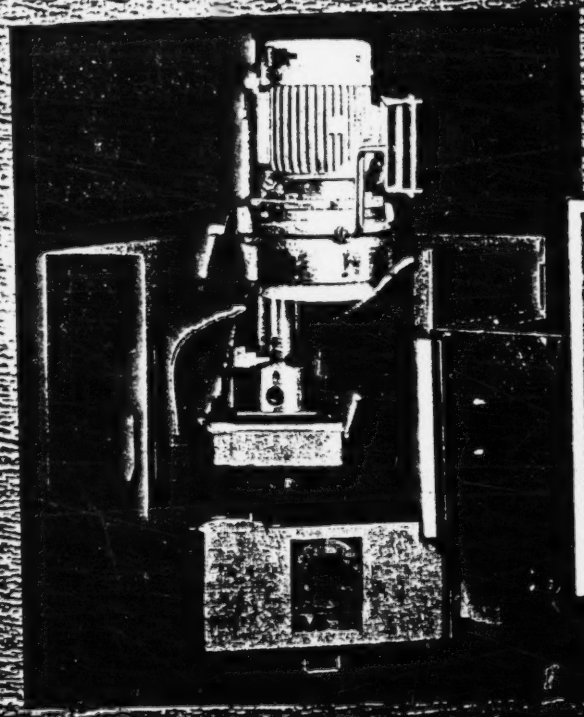


MEMORY EXPANSION





TOOL GRINDER TEG 160



Reduce down time and [illegible] with grinding tools, whether [illegible] tool. Designed especially for grinding [illegible] quality tool steels such as [illegible] and dies, the TEG-160 employs [illegible] grinding stone and a fluid cooling [illegible] together they produce an excellent [illegible] finish while they prevent [illegible] burn. With the use of two accessories [illegible] the TEG-160 allows precision [illegible] of shear angled punch.

MACHINE MOUNTS



PUNCH PRESS ACCESSORIES

AA 0505

AMADA ENGINEERING
& SERVICE CO., INC.
PHONE 800 . 854 . 3567

TERMS AND CONDITIONS

ORDERING PROCEDURES

AMADA ENGINEERING & SERVICE CO., INC.
14921 EAST NORTHAM STREET
LA MIRADA, CA 90638-5798
PHONE 800 . 854 . 3567
FAX 714 . 670 . 8637

AMADA ENGINEERING & SERVICE CO., INC.
799 BIERMANN CT., SUITE 120
MT. PROSPECT, IL 60056
PHONE 800 . 426 . 4204
FAX 847 . 699 . 1562

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	Cause No. 4:01CV01767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

DEPOSITION OF DONALD SHAFFER
On behalf of Defendant
May 9, 2002

TINA M. STUMPF, RPR, CSR
PREMIER REPORTING SERVICES
101 EAGLE LAKE DRIVE
COLUMBIA, IL 62236
(618) 281-7461 (314) 623-0763

ORIGINAL

EXHIBIT D

kind of press down on the bottom of it with the tip of your toe --

A. Right.

Q. -- is that like an on off switch, in other words, you press on it and it goes on and the ram moves at one speed?

A. On that specific machine? Because it's difrerent from machine to machine.

Q. Oh, okay. On the model press brake at issue, have you ever seen an electric foot switch on it?

A. No.

Q. Are you aware if any manufacturer makes an electric foot switch for the model press brake at issue?

A. Amada makes a foot switch.

Q. Does it -- Strike that.

Are you aware if Amada makes an electric foot switch for the model press brake at issue?

A. I'm aware that they have one available. I don't know who makes it.

Q. I'll try it a different way. Are you aware if a -- Strike that.

Are you aware if the electric foot switch that Amada has can be installed on the press brake at issue?

A. I am aware that they have a foot switch

that can be bought and put on that machine.

Q. On the model press brake at issue?

A. Right.

Q. For the foot switch for the model press brake at issue, do you know if that's an on off switch, in other words, you press it on and the ram only goes at one speed or can you vary the speed of the ram?

A. Because I've never installed one on that specific machine, I don't know what type of foot switch they have for that specific machine.

Q. Okay. How about this. On the foot switches that you have installed, do they operate as an on off switch that the ram would only go at a constant speed?

A. They have some that I've installed as a retrofit. They had at one time that they tried to use potentiometers and things like that. So I don't know how their history is. They had another foot switch at another time which was you push up acting and then they have another two foot switch is acting as one. One brings it up and the other brings it down. And then for the most common one that I've used is the foot switch that's a quick retrofit and I'm not sure if it's variable. I don't think that it is, but I don't know for sure.

Q. So to make sure I understand, on the foot switches, you're saying that there are different types of foot switches such that some foot switches you can make it so that the ram goes at varying degrees of speed and others that it goes at a constant speed?

A. They have in the past had some foot switches. I have never installed one. I've worked on machines. They had them available, because the customer has them on the machine that have a variable capability, but I don't know where they came from. The ones I put on, as far as I know, you can't vary the ram on it. That's what I'm saying.

Q. So the foot switches you put on when you press them, they only go at one speed, a constant speed.

A. Right.

Q. But you have seen other machines that have a foot switch where you can vary the speed of the machine?

A. Right.

Q. Okay.

A. Amada has another foot switch for another machine, the FPD that is variable.

Q. And the FPD is a press brake?

A. Press brake that has no treadle bar and it just has a foot switch.

Q. Are the foot switches on the Amada press brakes options?

A. No, not all of them. If you don't have a treadle bar, you have to have a foot switch, no.

Q. So some machines have treadle bars and some machines have foot switches?

A. Right.

Q. And is it up to the customer on whether they want a treadle bar or a foot switch?

A. I don't know how the decisions are made on what you have with the machine. I know that if they don't have a foot switch, they can buy one and have it put on.

Q. Okay.

A. But I don't know how they label it, if it's an option, if it's a retrofit. I don't know how Amada labels it.

Q. I don't know if I asked you this. I know I asked you about the treadle bar. Did you ever suggest to anyone at Newco that they should modify the press brake with a foot electric switch?

A. I told them that they should put a foot switch on that brake.

Q. When did you tell someone at Newco that they should put a foot electric switch on it?

A. I don't know.
Q. Would it have been before your accident or after your accident?
A. Before.
Q. And do you know who you told that to?
A. No. I'm not going to speculate. I don't remember who I talked to.
Q. And what did the person at Newco say when you suggested that they should put a foot electric switch on the press brake at issue?
A. I don't remember what they said.
Q. Did you tell this person at Newco why you were suggesting a foot electric switch as opposed to keeping the treadle bar on there?
A. I don't remember what I used exactly.
Q. How about generally?
A. I'd have to make something up to tell you. I don't remember.
Q. And I don't want you to make anything up.
A. I don't want to do that either.
Q. You and I are on agreement on not making things up, but let's talk about it and see if we can work with your memory. And if you just can't remember, then I'll move on to something else. You're sure prior to the accident that you suggested to somebody at Newco

that they should install a foot electric switch?
A. Yes. I do that to every customer I have that don't have a foot switch. I tell them that.
Q. And if the customer says sure, you know, Mr. Shaffer, I'll get the foot electric switch, then you'll go back and order one from Amada?
A. Right.
Q. And when you order it from Amada, do you get a commission on the sale of the foot switch?
A. Absolutely.
Q. And have you ever had any customer --
A. You know what, at that particular time, I would not have got a commission for that, because they changed how they did everything. So I didn't get commission for putting on a foot switch.
Q. So on the how many times have you told customers prior to your accident that you would recommend getting an electric foot switch as opposed to keeping the treadle bar on the press brake?
A. I don't know.
Q. Would it be more than 10 times or less than 10 times?
A. I don't know.
Q. Have you ever had a customer that said okay I'll get the electric foot switch and you can remove the

treadle bar?
A. I have never had a customer remove a treadle bar or said they were going to remove it, because it doesn't remove the treadle bar. It gives you a switch that you can turn the treadle bar on or off, which if somebody tries to push the treadle bar, it shuts the machine off to where it can't run, so that eliminates the possibility.
Q. So once you put the foot electric switch in, the treadle bar is inoperable?
A. You can make it inoperable. That's still an option. You turn a key. Treadle bar or foot switch.
Q. Let's get back to the foot electric switch. In all of the customers that you suggested that they use the foot electric switch, has any customer said go ahead and install a foot electric switch?
A. I installed a lot of them, but I can't remember how they were sold. Most of them, I think, actually most of my customers bought the foot switch with the machine and I've only had a few that would retrofit old machines, and I did have one specifically that did buy a foot switch from me.
Q. So you've said a lot. Let me back up, so I make sure I follow. Can you give me the name of any customer that you recommended a foot electric switch for

their press brake?
A. Yes.
Q. Okay. Give me the name of the customer or customers that you recommended a foot electric switch on their press brake.
A. That would be too many to name.
Q. Okay. How many customers have you recommended that they get a foot electric switch put on to their press brake to use instead of the treadle bar?
A. That would be any of my customers that had a treadle bar. I always recommended them getting a foot switch.
Q. Okay.
A. So it would be hundreds.
Q. Hundreds of customers?
A. Maybe. You know, because I've been all over the place. I mean specifically, if you want the name of one that did do that, I can give you a name with that.
Q. Go ahead.
A. I know a company in Washington, Missouri, that put one on a very old RG machine.
Q. Which is the company in Washington, Missouri that did it?
A. Daca. It's D-A-C-A.

(4)

Supreme Court, U.S.
FILED
APR 7 - 2004
OFFICE OF THE CLERK

No. 03-1170

In The

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

V.

AMADA AMERICA
INCORPORATED,

Respondent..

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William J. Meacham
Counsel of Record
521 St. Louis Street
Edwardsville IL
62025
(618) 692-672

Attorney for Petitioner

LIST OF PARTIES

All parties are identified in the caption.

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Crump v. MacNaughton 743 S.W. 2d 532 (Mo. Ct. App. 1987)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U,.S. 579, 125 L.E. 2d 469, 113 S. Ct. 2796 (1993) p. 10

Diviero v. Uniroyal Goodrich Tire Co. 919 F. Supp. 1353, 1357, affd at 114 F. 2d 951 (9th Cir. 1997) *pp. 8,9*

Kuhmo Tire Ltd. v. Carmichael 526 U.S. 137, 119 S. S. Ct. 1167, 1175 (1999) p.10

J.B. Hunt Trans., Inc. v. General Motors 243 F. 3d 441 (8th Cir. 2001) *p.*

McLaghlin v. Esselte Pendaflex Corp. 50 F. 3d 507 (8th Cir. 1995) *p. 9*

Morrison v. Kubota Tractor Company 891 S.W. 2d 422, 426, (Mo. Ct. App. 1994) *pp. 4, 5*

Oglesby v. General Motors Corporation 190 F. 3d 244 (4th Cir. 1999) *pp. 5, 6 , 7*

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill , training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

OSHA standard 29 CFR Subpart "O"

OSHA Regulations (Standards-29 CFR)
General Requirements for all machines -1910.212

(a) (1) Types of guarding .....

(a) (2) General requirements for machine guards.....

(a) (3) Point of operation guarding

(a) (3) (i) Point of operation is the area on a machine where work is actually performed upon the material being processed.

1910.212 (a) (1)

" *Types of guarding. One or more methods of machine guarding shall be provided to protect the operator* ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods are barrier guards, two hand tripping devices, electronic devices etc.*

OSHA Standard 29 CFR 1910.212 (a) (3) (ii)

"*The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.*"

OSHA standard 29 CFR 1910.147 (a) (iii)
Purpose :

This section requires employers to establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices, and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of

stored energy in order to prevent injury to employees.

OSHA Standard 1910.147 App. A Typical minimum lockout procedures:

(4) De-activate the energy isolating device(s) so that the machine or equipment is isolated from the energy source(s).

Other Standards Involved

American National Standards (ANSI) Standard B11.3 at 4. Construction , Reconstruction and Modification provide as follows:

4.1 *Responsibility*

4.1.1 Manufacturer. The manufacturer of new power press brakes, or any enterprise providing power press brakes for a new installation, shall provide power press power press brake in compliance with those provisions of Section 4 **that apply.** (emphasis added)

ANSI Standards B11.3 at 4.2.1, *Hazards to Personnel Associated with MovingParts (***Other than Point of Operation Hazards)** (emphasis added) provides;

The manufacturer of new power press brakes shall eliminate the moving-parts hazard by design, where possible, or provide protection against the hazard in accordance with American National Safety Standard for Mechanical Power Transmission Apparatus, ANSI B15.1-1972, or latest revision thereof approved by ANSI. Where the hazard cannot be eliminated by design or protection the manufacturer shall warn against the hazard.

ANSI 3.45 *Point of Operation.* The area of the tooling or dies where material is actually positioned and work is being performed .

ANSI B11 6.1.4 et seq *Safeguarding the Point of Operation*

ANSI B11.3 4.2.2 Hazards to Personnel Associated with the Point of Operation. Point of operation hazards and the employer's responsibility regarding those hazards are covered in Section 6.

ANSI B11.3 4.2.2 *Hazards to Personnel Associated with the Point of Operation* . Hazards at the point of operation are an entirely different problem from those which can be considered in the construction of the basic machine and its accessory equipment. Thus, point of operation hazards must be considered separately.

ARGUMENT

THE CASES CITED BY DEFENDANT IN ITS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PROVIDE NO SUPPORT FOR DEFENDANT'S POSITION

Defendant cites Morrison v. Kubota Tractor Company 891 S.W. 2d 422, 426 (Mo. Ct. App. 1994) for the proposition that "a manufacturer is not obliged to adopt only those features which represent the ultimate in safety or design." " holding that the mere availability of a rollover guard did not render a tractor

manufactured without one defective" Brief in Opposition pp. 27, 28.

As was pointed out in Plaintiff's Reply Brief in the 8th Cir.; *Morrison* was decided on a **negligence count.**

Morrison held that the absence of a Roll Over Protection System on a tractor was an open and obvious danger that was apparent to the decedent who had 40 years experience with tractors. An obvious danger **was not actionable under the negligence law of Missouri.** (emphasis added) Morrison at 427, 428 The jury returned a verdict finding Morrison 100% at fault in the strict product liability count. *Morrison at 425*

Morrison v. Kubota Tractor 891 S.W. 2d 422, (M0 Ct. of App. 1994) at 428. Note 5 specifically declined to decide whether the open and obvious nature of the peril posed by the absence of a safety device such as a Roll Over Protection System on a given product may justify a directed verdict in a products liability case after Missouri's adoption (by statue) of comparative fault in such cases.

In *Oglesby v. General Motors Corporation 190 F. 3d 244 (4th Cir. 1999)* the plaintiff was leaning into the engine compartment of a seven -year old Chevrolet Silverado pickup truck to adjust a transmission cable, a radiator hose detached, causing Oglesby serious burn injuries. Oglesby filed a products liability action against General Motors, claiming that his injuries were caused by a defective plastic hose connector between the radiator and the radiator hose. Oglesby tendered Douglas Bradbury, a former professor of mechanical engineering at Clemson University, as an expert witness. He had no

particularized experience or expertise in evaluating either automobile manufacturing processes or the strength of plastic automobile component parts. In preparing to render his expert opinion Bradbury looked at the broken plastic connector and the piece that broke off, took physical measurements of the connector, and photographed the parts He found that the connector was not circular but was a flattened oval in shape. noting that "the difference in the "major" and minor dimensions was 1/10 inch. " From his observation and measurement Bradbury concluded:

> "The out-of-roundness of the upper (inlet) hose connector was apparently a manufacturing defect. Certainly there would be no reason to design it as an oval shape, considering the method of clamping. Two probable causes of the out-of-roundness are recognized. One is that the upper connector was manufactured out-of-round. This is most unlikely. It is most likely that a defect in the formulation or handling of the thermo-setting plastic caused time -dependent internal stresses which deformed the connector form round to oval, ultimately resulting in the loosening of the upper hose and the scalding of James Oglesby. After Bradbury gave his opinion a General Motors expert testified that the part was " not a thermo-setting plastic," but a "nylon composite, glass filled " that had "thermoplastic " characteristics including the "ability to be remolten." Bradbury submitted an affidavit stating that he incorrectly identified the material in question, but his opinion was unchanged.

The Court found that Bradbury assumed that the part could only have gotten out of round due to mishandling of the part during the manufacturing process. He could not eliminate other possibilities, including, engine overheating, trauma to the inlet connector if the radiator when removed from the car had tipped over, or stress applied by leaning on the connector with too much weight when the plastic was hot, all of which would be consistent with the history of the part. Bradbury had no factual basis to make the assumption that the part could only have gotten out-of -round before it left the manufacturers control.

The Court found that Bradbury's opinion depended on the premise of the inability of the part to change shape once it was "set." Bradury did not alter his opinion at all when confronted with the error in his underlying assumption as to the composition of the part. *Oglesby V. General Motors Cooperation 190 F. 3d 244 (4th Cir. 1999)*

In Ancho v .Pentek Corp. 157 F. 3d 512 (7th Cir. 1988) the proffered expert had no experience with the matters in question. Additionally **he failed to even visit the accident site or view the conveyor or any similar conveyor system in operation.** (emphasis added) In *Ancho*

The entire plant would have to be reconfigured if the transfer car were eliminated. All traffic would have to be rerouted around the conveyor, or moved elsewhere. The Appellate Court expressed great doubt that he had any way of knowing whether it would be feasible to eliminate the transfer car. *Ancho V. Pentek Corporation 157 F. 3d 512 513, 514, 517, 518 (7th Cir. 1998)*

Chapman V. Maytag Corporation 297 F. 3d 682 (7th Cir. 2002) involved an electrocution of a homeowner who had plugged an electric stove into a

non grounded electrical outlet. The proffered expert, a mechanical engineer, opined that an electrical circuit breaker failed to trip due to a "restrictive short" rather than a direct short. The Court held that the proffered expert, Petry, was not qualified to render an opinion on electrical matters as he was a mechanical engineer with no particular training or experience in the field. The Court further held that Petry's testimony did not satisfy any of the Daubert factors. *Chapman V. Maytag Corporation 297 F. 3d 682, 688 (7th Cir. 2001)*

In *Tokio Marine & Fire Insurance Co. V. Grove Manufacturing Co. 958 F. 2d 1169 (1st Cir.. 1992)* the excluded "expert" was found by the trial court to be a "hired gun" with a background as an "instant expert in an astonishing number of areas" which "suggested he would not possess the professional safeguards ensuring objectivity." 762 F Supp. at 1017. Supp. at 1017, 958 F. 2d 1169 , 1174.

He admitted that he had never examined the crane involved in the accident in the case, or spoken with its operator. He had bachelor's degree in **civil engineering. He conceded that he was not an expert on load moment indicators.** He was prepared to testify that the absence of a load moment indicator would have prevented the crane from overturning.

Defendant cites *Diviero V. Uniroyal Goodrich Tire Co. 919 F. Supp. 1353, 1357, aff'd at 114 F. 2d 951 (9th Cir. 1997* for the proposition that courts have excluded the testimony of engineers because their expertise was not particular to the science involved in the case. In *Diviero,* the proffered expert sought to testify regarding an alleged design or manufacturing adhesion defect in a steel belted tire. The engineer had no prior experience with steel belted tires, only with bias belted tires. He stated that the two

types of tires differed significantly. He had, by his own admission, no knowledge of the complex chemical, mechanical, or thermal components that go into the process of the steel to rubber interface on a steel belted tire. He stated simply "When I have a tire that has separated, I have breakdown in the adhesion, there's no question about that." 991 F Supp. 1353, 1356, 57.

In *J.B. Hunt Trans, Inc. V. General Motors 243 F. 3d 441(8th Cir. 2001)* claimed to be an expert in "foamology." As far as the District Court was unable to determine there is no science of foam. The Court stated: "He has no idea what happens to foam under normal circumstances, so how can he have any scientific basis for basing any of his conclusions on what happened to the foam in this case ?" 243 F. 3d 441, 444.

In *McLaghlin v. Esselte Pendaflex Corp. 50 F. 3d 507, (8th Cir. 1995)* the plaintiff brought a discrimination action against her former employer. The Court held that the uncontroverted evidence was that the new position had differing duties that the employee failed to demonstrate she was able to perform.

Crump v. MacNaughton 743 S.W. 2d 532(Mo. Ct. App. 1987) reversed a directed verdict for the defendant in a product liability case. The plaintiff's evidence was strictly circumstantial. The Court stated: "A case based in strict liability does not require an impossible standard of proof. The proof need only be realistically tailored to the circumstances.

This Court's Rulings in Daubert and Kuhmo Tire do not require the impossible standard of proof imposed on the plaintiff by the District Court in the instant case. The Decisions of the District and Appellate Courts in the instant case so far depart from

the accepted and usual course of judicial proceedings as to call for this Court to exercise its supervisory power. Neither the defendant or either of the Courts have been able to cite even one case which remotely supports the aberrant decisions rendered below. The undersigned has scanned or read in full literally hundreds of the decisions which cite Daubert. The undersigned has found no case in which the facts are even remotely close in which an expert witness was barred or summary judgment entered.

If allowed to stand, the erroneous decision of the 8th Circuit will send a clear message that Courts need not conform to the dictates of this Court as set forth in *Daubert and Kuhmo Tire.* Federal Courts will be free to impose individualized standards requiring a plaintiff to prove his or her case beyond any question of scientific or engineering certainty **to survive a Motion for Summary Judgment.** Only experts who have a vested interest in defending the alleged dangerous product will be allowed to testify. **Under the decision above no plaintiff will ever be able to overcome a Motion for Summary Judgment in a products liability case in the 8th Circuit. Justice will be left to the whim of the District Court .**

This Honorable Court is the final arbiter of Justice. For the reasons and authorities cited Petitioner prays this Honorable Court to Grant the Petition for Writ of Certiorari in the above entitled cause.

Respectfully Submitted,
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MOTION FILED
MAR 30 2004

(3)

No. 03-1170

In The

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

V.

AMADA AMERICA INCORPORATED,

Respondent..

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Sanctions for Making a False Statement to The Court; and for Leave to Supplement the Record

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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether in a product liability case a Ph.D. mechanical engineer with over twenty years experience as a professor and researcher in the fields of machine design and safety, who has programmed press brakes to operate by computer numerical control must have actually designed a safety device(s) commonly used in the industry, which is recognized and required by OSHA regulations and American National Standards Institute Standards; and marketed by nearly every manufacturer of power press brakes, in order to be considered qualified to render an opinion as to the feasibility of installing such a devise(s) on the power operated press brake at issue.

Whether recognition by the American National Standards Institute, and The Occupational Health and Safety Administration, production and sale by virtually every manufacturer of power press brakes, testimony by defendant's employees of common usage of a safety device on press brakes sold by the defendant, and identification by the defendant's retained expert of safety devices recommended by the plaintiff's expert as methods of guarding that could be used on the press brake at issue, in a product liability /design defect case constitutes "general acceptance " pursuant to this Court's rulings in *Dauber v. Merrell Dow Pharmaceuticals, Inc,. 509 U.S. 579, 113 S. Ct.. 2786, (1993) and Kuhmo Tire Ltd. v. Carmichael 526 U.S. 137, 119 S. Ct. 1167 (1999)*

Whether in the absence of expert design testimony the testimony of plaintiff's safety expert, Mandara Savage, Ph.D., stating that due to the fact that the maintenance operation plaintiff was performing at the time of his injury had to be performed while the press brake was energized, in violation of Occupational Safety and Health Administration (OSHA) Standard 1910.147 (a) 147.10, caused an unreasonably dangerous condition to exist with regard to a normal maintenance procedure, coupled with evidence of

OSHA regulations and American National Standards Institute (ANSI) standards, which recognize and require forms of machine guarding as identified by plaintiff's expert design witness, along with the testimony of defendant's employees and retained expert design witness raise sufficient factual questions to allow a jury to find that the machine in question was unreasonably dangerous to preclude the entry of summary judgment for defendant .

LIST OF PARTIES

All parties are identified in the caption.

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CITATIONS OF OPINIONS AND ORDERS

ENTERED

United States District Court for the Eastern District of Missouri No. 4:02CV1767CDP

United States Court of Appeals for the Eighth Circuit

No.03-1388 UNPUBLISHED

JURISDICTIONAL STATEMENT

(a) This Court's jurisdiction is invoked pursuant to United States Supreme Court Rule 10 (a) United States Court of Appeals has entered a decision which conflicts with the decisions of more than one other United States Court of Appeals on the same important matter.

A United States Court of Appeals has sanctioned a decision by a lower court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

(b) The decision of the United States Court of Appeals for the Eighth Circuit was entered September 18, 2003.

(c) A timely Petition for Rehearing with Petition for Rehearing En Banc was filed on October 02, 2003

(d) An Answer to the Petition was requested on 10/14// 03

(e) the Petition for Rehearing with Petition for Rehearing En Banc was denied on November 12, 2003

.

(f) The District Court had jurisdiction pursuant to 28 United States Code 1332 (1) . Plaintiff, Donald Shaffer was a citizen of the State of Illinois when the case was filled. Plaintiff is currently a resident of the State of Texas. The Defendant is a corporation organized under the laws of the State of Washington.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill , training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Civil Procedure 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

OSHA standard 29 CFR Subpart "O"

1910.212 (a) (1)

" *Types of guarding. One or more methods of machine guarding shall be provided to protect the operator* ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods*

OSHA Standard 29 CFR 1910.212 (a) (3) (ii)

"*The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."*

OSHA standard 29 CFR 1910.147 (a) (iii)

Purpose :

> This section requires employers to establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices, and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of stored energy in order to prevent injury to employees.

OSHA Standard 1910.147 App. A

Typical minimum lockout procedures:

> (4) De-activate the energy isolating device(s) so that the machine or equipment is isolated from the energy source(s).

STATEMENT OF THE CASE

This cause arises out on an industrial related injury that occurred on March 01, 2000 at the Newco manufacturing facility in St. Charles Missouri. The plaintiff, Donald Shaffer, suffered a crush injury to his right hand, resulting in multiple digit amputations. Mr. Shaffer's hand was caught between the lower beam and the die on an Amada 5020 LD up acting press brake. The point where the lower beam and die meet is the "point of operation," the point at which metal is bent. Newco uses the press brake at issue to bend sheet metal for fabrication of automatic coffee makers.

At the time of his injury Mr. Shaffer was employed as a Service Engineer by Amada Engineering and Service Company. Mr. Shaffer was attempting to correct a problem with the lower beam at the time of injury. The lower beam, which rises to bend the metal between the beam and the die, was supposed to be adjusted so that it could only open far enough to allow a piece of sheet metal to be inserted between the beam and the die. The beam was opening approximately 4 inches at the time of the injury. The press brake was closed for use by Newco employees as it was considered unreasonably dangerous to operate the machine in the condition.

Mr. Shaffer brought an action based on strict product liability in the United States District Court for the Eastern District of Missouri against Amada America, Inc., importer and seller of the press brake in question.

Mr. Shaffer alleged that the press brake in question was unreasonably dangerous due to design and manufacturing defects, including, but not limited to: (1) lack of machine guarding, specifically either a mechanical guard to prevent the operator's hand from entering the space between the up acting beam and the press dies, or a light curtain that would deactivate the machine in the event that the operator's hand entered the space between the beam and the die; known as the "point of operation.," or the "die space"

the place where the metal is actually bent. (2) Mr. Shaffer also alleged that the design of the machine posed an unreasonable risk that a person attempting to adjust the bottom position of the lower beam; as he was doing, would lose his or her balance while standing on one foot and operating the treadle bar which activates the lower beam with the other foot; while standing directly in front of the machine; causing the person to either fall into the machine or grab the edge of the machine to regain balance. As the machine was not equipped with any type of guard, Mr. Shaffer alleged an unreasonable risk that the worker's hand would enter the die space and be crushed. Mr. Shaffer tendered Professor Amirouche, Ph.D. as an expert design witness.

Professor Amirouche testified, inter alia, that the press brake should have been equipped with mechanical guards which would have prevented the operator's hand from entering the "'point of operation" or sensory electronic devices (commonly used in the industry, called "light curtains," and in fact sold by the defendant as safety devices for the press brakes sold by defendant) which would have instantly stopped the machine in the event that the operator's hand entered the point of operation.

The District Court, without holding a Daubert hearing, granted Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouche. The District Court based its decision in part on the fact that Professor Amirouche had not designed a press brake, nor had he worked for a company that manufactured press brakes. Professor Amirouche had not personally designed the guards he recommended. He testified that such forms of guarding are commonplace. He is an expert in the field of electronic sensors, and in his experience such devices can be readily adapted to all types of machinery. He further testified that while he had not designed a mechanical guard for the machine at issue, he could do so if requested.

The District Court held that the expert testimony of plaintiff's tendered safety expert, Professor Mandara Savage, Ph. D., without Professor Amirouche's testimony, was not sufficient to establish a question of material fact. Dr. Savage testified that the necessity to service the machine while it was energized caused an unreasonably dangerous condition , and was in violation of Occupational Health and Safety Administration (OSHA) Standard 29 CFR 1910.147 which requires the machine to be isolated from the energy source and rendered inoperative while service is performed. The District Court did not comment on the testimony of Amada's retained expert who identified the forms of guarding recommended by Professor Amirouche as types of guarding which could be used on the press brake at issue. The District Court did not comment on the testimony of Amada employees who stated that they had installed numerous light curtains on Amada press brakes and saw no reason why such devices would not work on the machine in question.

PURPOSE OF THE MOTION

Petitioner seeks appropriate sanctions for the defendant's conduct in making an obviously false statement and accusation to the Court. Specifically, on page 25 of Amada's **Brief in Opposition to Petition for Writ of Certiorari** defendant states:

> "As argued to the District Court and the 8th Circuit , Petitioner alleges that the mere fact that the Press Brake lacked certain guards constitutes evidence of a defective condition. *Swe e.g.*, Petition pp. 17, 25 (listing various guards allegedly available for the Press Brake)"

The foregoing is basically true . The following footnote is nothing more than a bald faced lie>

> "The record indicates that the Press Brake was indeed equipped with guards ." As such , not only is Petitioner's argument without merit, it is also inaccurate and misleading.

PURPOSE OF THE MOTION

Petitioner seeks leave to file an exhibit, which, to the best of Petitioner's knowledge, did not exist at the time of filing of the Petition for Writ of Certiorai in the above cause, and if it did in fact exist, it was not known to counsel.

The exhibit in question is an advertisement for a foot switch sold by the defendant, Amada America, Inc; as a retrofit device. The foot switch offers an alternative method of activation of Amada power press brakes, including the Model RG 5020LD, which is the model at issue in the instant case.

The record in the instant case contains a copy of a previous advertisement by Amada America, Inc. for electro pneumatic foot switches to be used with Amada press brakes, including the press brake at issue. In the new exhibit offered Amada America states :

> Foot Switches
>
> > Amada Engineering stocks a wide array of foot for all press brake models such as RG, FBD and HFB These include retrofit switches which will add versatility to your press brake for staging or Dual Operator operations. Reduce Operator fatigue while **increasing safety of the bending operation. (emphasis added)**

ARGUMENT

Reasons to Allow Motion for Sanctions

There is no evidence of record to indicate that the Pesss Brake at issue was equipped with any Guard whatsoever. The photographs and video tape taken by a professional photographer at

the defendant's request at the Newco facility at the time of Professor Amoirouche's inspection of the machine in question, at which defense counsel and defendant's expert were present, verifies that no guards were in place. The parts list, defendant's Exhibit 5? Deposition of Farid Amirouche identifies a "rear guard" which has nothing to do with the point of operation, which is where the plaintiff was injured .

No claim of guards in place has been made in either the District Court of the Appellate Court for the simple reason that no guards were in place on the machine at any relevant time.

Mr. Shaffer , in the document entitled "my description of the accident, quoted in part by defendant in its **Brief in Opposition** at p. 4 ; states that one of the reasons for Mr. Shaffer's injury was lack of a safety barrier such as:

> "a light curtain or a mechanical guard or anything to keep somebody from putting there hand in there." (Donald Shaffer deposition pp. 165, 1666 Defendants Separate Appendix Volume II 0302)

Mr. Shaffer further testified that he did not lay his hand on the ram and become distracted. He did not know how his hand came to be in the point of operation he did not know it was there until after it was crushed. The only ways he could think of to account for his hand being where it was would be he became distracted or lost his balance. (Defendant's Appendix Volume II pp. 0300, 0301 , 0327

Mark Herbert ,Newco Press Brake Operator , felt that the condition that Don Shaffer was trying to repair, the failure of the lower beam to lock in the correct position; caused an unsafe condition. At the time of Mr. Shaffer's injury it was impossible to adjust the position of the lower beam in the desired manner; as it was falling to the lowermost position. (Herbert dep. p. 82 Exhibit Appendix p. 129) The press brake had been shut down prior to Mr. Shaffer's

attempt to cure the problem. It was felt to be unreasonably dangerous due to the excess space between the beam and the die, which allowed room for a person's fingers to enter the space between the beam and die. (Herbert deposition p. 82. Exhibit Appendix p. 129).

In order to perform the repair that Mr. Shaffer was attempting to perform the machine had to be in an operational mode; it could not be disconnected from the power source. (Exhibit 3 excerpt from Amada service manual, Appendix pp. 12-14, Don Shaffer Deposition pp. 171, 172. Exhibit Appendix p 206).

In order to adjust the lower position of the lower beam Mr. Shaffer had to press and hold the bar pedal (treadle bar) to raise the lower beam. He then released the treadle bar to allow the lower beam to drop to the desired position. He then turns a lever called the Handwheel, which is located on the left side of the machine 26" above the floor, downward to lock the lower beam position. (Plaintiff's Exhibit 3 excerpt from Amada Operators Manual, Appendix pp. 12-14. Exhibits 4-8 pictures illustrating the process, Appendix pp. 45-49) (Don Shaffer deposition pp. 171, 172, Exhibit Appendix p. 206) Mark Herbert was standing beside the plaintiff, not behind him when the injury occurred as the defendant has alleged in its Motion for Summary Judgment.

> Q. Where were you standing at the time of the accident?
>
> A. Directly to his right. Right in front of the machine. I was not looking over his shoulder. We were shoulder to shoulder...He was on my left side, and I was leaning over looking at the mechanism in question, the stop mechanism. The only thing I could see from my peripheral vision was like Don's legs and his left hand. I could tell by the mechanism and the ram that he had run it through. I don't know if it was completely through the strokes, but he had the ram moving and it had moved I'd say four or five times in an up and down motion. And at

the time that he was injured, I didn't know where his right hand was at all because that was out of my peripheral vision. But his left hand had--The ram was moving in an upward position and he had pushed the lock lever down to lock the ram into place.....

A. Okay. The ram was closing or coming up and he had pushed the lock lever down, and that was when I heard him scream. I assumed at first that he had maybe pinched his finger when he pushed this lock lever or something, and I jumped. I was startled. He had screamed, and I stood up. And then when I stood up, I looked at him and he took his left hand and cupped his right hand. And when he did that I saw the blood coming from his fingers. (Mark Herbert deposition pp. 57, 58, 59, 60, Exhibit Appendix pp.124-126)

REASONS TO ALLOW MOTION TO SUPPLEMENT THE RECORD

Petitioner's tendered expert design witness, Professor Farid Amirouche, testified that one of the defects in the press brake was the use of a treadle bar which is located on the front of the machine nine inches above the floor, as a means of activation of the press brake machine. Professor Amirouche testified that the treadle bar, which has approximately four inches of free travel before the process of activation begins, is dangerous and unreliable as a means of foot support. Professor Amirouche believed that Mr. Shaffer lost his balance, grabbed the machine, unfortunately in the space between the 55 to ram and the die where metal is bent, and shifted his weight to regain balance, thus activating the machine by depressing the treadle bar. As a result Mr. Shaffer suffered multiple amputations of his right fingers.

Defendant's retained expert, Peter Schwalje, concurs in the opinion that Mr. Shaffer grabbed the machine in an effort to regain stability.

Professer Amirouche stated, inter alia:"

"In my opinion, the Brake press treadle bar is dangerous and unreliable. It is haphazardly controlled, and provides a dangerous mechanism for foot support.

I certainly believe that if a foot electric/pneumatic switch had been in use Mr. Shaffer wouldn't have had his fingers crushed and would still have his hand today. Furthermore, the press brake should have built-in safety guards of a mechanical/sensory nature that would prevent such accidents from occurring. "

"Mr. Shaffer demonstrated to me, how the brake press operates. He stood with one foot on the ground and the other on the treadle bar. The right foot that barely was in contact with the straddle bar was maintained in space when the ram was not activated. I was able to observe the operator on the same machine earlier performing the same task. It became apparent to me that the operator is standing on one foot while having the other foot on and off the treadle bar. Given the fact that there is no resistance on the treadle bar for over four inches, there exists a strong possibility for anyone not trained on posture and stability to lose balance. Any distraction such as turning around to answer a question or reach for a tool would initiate an instability causing the person to try to regain posture and stability. The latter is achieved by grabbing into something while trying to readjust the body to regain the equilibrium position.

A rigorous training will be needed to avoid catastrophic accident. To my knowledge, there are no Press brakes currently operational nationwide without a foot electric switch. The electric/pneumatic foot switch allows the operator to have his/her foot on the ground at all times, providing the support and balance needed at the job. (Amirouche Report)

The offered exhibit indicates that defendant, Amada America Inc., concurs with Professor Amirouche's opinion that a foot switch is a safer design alternative to the treadle bar. Amada's design expert, Peter Schwalje, stated in his deposition that Cincinnati and Amada were the only manufacturers of press brakes known to him to market a press brake with a treadle bar means of activation as opposed to a foot switch as of September 24, 2002 the date of his deposition. He did state that he had not recently looked to see " whats here today" He also stated that he was aware that Amada offered foot control devices as an optional means of activation at the time the press brake at issue was sold . (Deposition of Peter Schwalje, pp.93, 96, Mr. Schwalje was also aware that light curtains were commonly offered as options by various manufacturers, he had not made a study of all manufacturers but based his opinion on sales documents that he had seen . (deposition pp. 97 98 .)

Amada employee, Themis Alexopolulos, Regional Service Manager, testified that as an area service engineer he had installes12 to 15 foot switches on Amada press brakes. He worked as an area service engineer from June 17, 1985 until approximately April 1998. A service engineer installs and repairs Amada equipment. He is aware that the RG 5020 LD press brake, at issue in the instant case, can be operated by a foot control switch. He identified a light curtain as device which can be used as a point of operation guard on an Amada press brake. He had installed light curtains on Amada press brakes. Themis Alexopoulos deposition pp. 6, 7, 21, 22, 24,)

The admission of the tendered exhibit into the record would further support plaintiff's position that the safety devises identified by Professor Amirouche are widely accepted in the industry. Professor Amirouche's opinions meet the *Daubert* tests for general acceptance and peer review due to the wide general acceptance in the industry of the safety devices he has identified. The defendant itself, along with other manufacturers, sells and installs at least two of the safety devices identified by Professor Amirouche. As far as the *Daubert* factor of testing it

is clear that the safety devices advocated by Professor Amirouche have been widely tested in the market place. Foot switches and light curtains are commonly offered by various manufacturers of press brakes. OSHA standards and American National Standards Institute standards recognize these types of guarding.

The District Court clearly abused its discretion by holding that Professor Amirouche's opinions were inadmissible do to the lack of sufficient facts and data to support them. The District Court clearly abused its discretion by holding that Professor Amirouche offered "laundry list of abstract ideas."

For the reasons and authorities cited above this Honorable Court should Grant Petitioner's Motion to Supplement the Record. Petitioner prays this Honorable Court to impose such sanctions as the Court deems just and proper for Defendant's action in making obviously false and misleading statements to the Court regarding the presence of guards on the press brake at issue.

Respectfully Submitted
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UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

No. 03-1388

Donald Shaffer,	*	
	*	
Appellant,	*	Appeal from the
V.	*	United States
	*	District Court for
Amada America, Inc.,	*	Eastern District
	*	of Missouri
Appellee.	*	[UNPUBLISHED]
	*	

Submitted : September 10, 2003

Before: WOLLMAN, FAGG and RILEY,

Circuit Judges:

PER CURIAM.

Donald Shaffer, a service engineer for Amada Engineering and Service, Inc., crushed his fingers while repairing a press brake machine, which bends metal. Shaffer brought this diversity action against Amada America, Inc., (Amada) , the press brake's seller, alleging the press brake was defectively designed. to prove defective design, Shaffer proffered the testimony of Farid Amirouche, a doctor of mechanical engineering. The district court* granted Amada's motion in limine to exclude Dr. Amirouche's testimony under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharm.,

Inc. 509 U.S. 579, (1993). Without expert testimony to prove the press brake was defective, the district court granted summary judgment to Amada. Shaffer appeals asserting the district court should not have excluded Dr. Amirouche's testimony.

We review the exclusion of expert testimony for abuse of discretion. Jaurequi v. Carter Mfg. Co. 173 F. 3d 1076, 1081 (8th Cir. 1999). Expert testimony is generally admissible when it is reliable and relevant. *Id:* Fed. R. Evid. 702. District courts have considerable latitude in deciding whether expert testimony meets this standard., and in doing so, may consider one or all *Daubert* factors. 509 U.S. at 593-94; see Jaurequi, 173 F. 3d at 1082. The polestar is the scientific validity of the principles underlying the expert's opinions. Jaqueri, 173 F. 3d at 1082.

* The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri

Dr. Amirouche would have testified the press brake's treadle bar is dangerous and unreliable, a foot electric/pneumatic switch should be used, and the press brake should have built in safety guards of a mechanical /sensory nature to prevent accidents from occurring. Dr. Amirouche based his opinions on his experience as professor and researcher in the area of mechanical engineering design and biomechanics for over twenty years. He relied on Shaffer's statement about the accident, an OSHA press release about reducing power press injuries, Safety Lines information on brake presses, Amada operating manuals, medical records, hand photographs, pictures of the press brake, video of the press brake, the Amada Engineering Elector pneumatic foot switch, and publications about injuries resulting from fingers being crushed by a press brake. The district court concluded Dr. Amirouche's testimony was unreliable, however, because the testimony was not based on sufficient facts and data. He had not designed or tested the devices he claimed would have prevented the accident, there was no peer review of his theories , and there was no evidence of the general acceptance of his abstract theory that certain devices would have

prevented the accident. See Daubert 509 U.S. at 593-94.

The district court did not abuse its discretion in excluding Amirouche's testimony. The record shows Amirouche has no experience with press brake designs, he has been a full-time professor since 1984, and he has never designed a press brake, a press brake guard, or an electro-pneumatic foot switch for a press brake. Although Amirouche identified a switch that could be used on a press brake, the switch could not be used on the press brake at issue and was not used on any press brake. Further, Amirouche has never tested press brakes or published any articles or research about press brakes. Indeed, Amirouche could not identify any code or standard applying to the design, manufacture, service, or operation of press brakes. Shaffer's industrial safety expert proffered testimony identifying the applicable design standard, but admitting that the press brake at issue met the standard's requirements. Given Dr. Amirouche's lack of design experience or expertise involving press brakes, the district court properly excluded Dr. Amirouche from testifying that the press brake was defectively designed. See Anderson v. Raymond Corp., No. 02-3393, 2003 WL 21919577, at * 2(8th Cir. Aug. 13, 2003) ; Oglesby v. General Motors corp. 190 F. 3d 244, 250-251, (4th Cir. 1999) ; Ancho v. Pentek Corp; 157 F. 3d 512, 518 (7th Cir. 1998)

Shaffer also contends that even if the district court did not abuse its discretion in excluding Dr. Amirouche's opinions, the district court committed error in granting summary judgment to Amada because Missouri law holds the failure to guard may be a design defect. Although a press without proper guarding may be unreasonably dangerous, Murphy v. L& J Press Corp. 558 F. 2d 407, 411 (8th Cir. 1977) Shaffer still had the burden to prove the design was unreasonably dangerous, Pree v. Brunswick Corp. 983 F. 2d 863, 865, (8th Cir. 1993) To do so, Shaffer must show there is a safer alternative design for the press brake that injured him. Dancy v. Hyster Co.

127 F. 3d 653-54 (8th Cir. 1997) Shaffer cannot make this showing without expert testimony. Id. Halving properly excluded the testimony of Shaffer's only design expert, the district court properly granted summary judgment to Amada.

We thus affirm the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

In March 2001, Donald Shaffer, a service engineer for Amada Engineering and Service[1], Inc., was injured while servicing a brake machine at the Newco Company's St. Charles, Missouri plant. As Shaffer was adjusting lower ram position of the up-acting press brake, the Amada model RG5020LD, somehow his right hand came between the lower ram of the machine and the upper die. As the machine cycled upward, Shaffer's fingers were crushed. He evidentially lost multiple fingers.

Shaffer sued Amada America, Inc., the seller of the press brake, claiming that it was defectively designed. Both parties retained experts, and both parties have filed motions in

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[1] Amada Engineering merged with defendant Amada America, Inc. in July 2001, after the accident.

limine to exclude certain testimony offered by these experts. Additionally, Amada America has moved for summary judgment. For the reasons discussed below, I will grant Amada America's motion in limine with respect to Farid Amirouche – Shaffer's only expert witness regarding defective design of the press brake – and, as a consequence, I will also grant Amada's motion for summary judgment.

I. Facts

On March 1, 2000 Donald Shaffer went to the Newco Company's plant in St. Charles, Missouri, to repair a broken control switch on one of Newco's newer machines, the Amada model RG5020LD. After Shaffer finished this task, he was asked by Newco employee Mark Herbert to fix another problem with the machine. Herbert told Shaffer that the lower ram on the press brake was slipping from its lower set point.

Shaffer went through several cycles of the machine to examine the problem, using the treadle bar (a bar located at the base of the machine which is depressed in order to start the cycling of the press brake). Mark Herbert was standing behind him looking over Shaffer's right shoulder. At some point, plaintiff was injured when his hand and several of his fingers were caught between the lower ram and the upper die.

Shaffer has made several statements, but he cannot remember exactly how the accident happened. Eyewitnesses and Amada employees to whom Shaffer recounted the

events are similarly uncertain of exactly how Shaffer's hand got between the ram and the die.

Shaffer retained Dr. Farid Amirouche as an expert witness. Dr. Amirouche is prepared to testify to the following six opinions:

1. The treadle bar of the machine is dangerous and unreliable because there is excessive "Travel" in the bar that leads to operator instability.
2. The ram should have some sort of support built into the front of it, such as a ledge or a platform that extends outward, on which plaintiff could have rested his hand.
3. A foot operated electric or pneumatic switch would have prevented the accident because it would not have excessive "travel" like the treadle bar and because it could be moved farther away from the machine.
4. Safety guards of a mechanical/sensory nature would have prevented the accident. Examples of mechanical guards would be a block or a steel rod to place in the machine while it is being serviced to prevent the ram and die from closing. Examples of sensory guards would be a "light curtain" or a force-field that would detect the presence of a foreign object in the press and cause it to stop.

5. A safety manual should have been provided to Shaffer before the accident.[2]
6. Plaintiff's accident must have happened because he lost his balance with his foot on the treadle bar and then placed his hand on the lower ram in order to steady himself.

Dr. Amirouche has a Ph.D. in Mechanical Engineering and has for approximately twenty years taught courses such as Mechanical Engineering, Design, and Biomechanics at the University of Illinois at Chicago. He has written a recently-updated book called Principles of Computer-Aided Design and Manufacturing, but he admits that the pertinent chapters of his book focus more on computer-automated press brakes, rather than on operator-run brakes, such as the RG5020LD.

Dr. Amirouche has limited experience with press brakes. He operated a press brake perhaps four or five times during the course of his undergraduate engineering studies in 1977. Also while in school, in 1979, he saw a press brake being operated. He has never conducted any research on press brakes or guards for press brakes independent of this litigation. At a conference for the National Institute of Health and Safety in 1999, Amirouche participated in a

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[2] Plaintiff has never pleaded a failure to warn theory. As a result, I will not address this opinion of Dr. Amirouche. Additionally, the evidence indicates that a manual was attached to the machine, but the expert was not aware of that when he wrote his report.

committee meeting that spent about 45 minutes discussing press brakes over the course of the two-day conference. Dr. Amirouche has not published any articles regarding press brakes.

II. Defendant's Motion in Limine Dr. Amirouche

Shaffer has proffered the testimony of Dr. Amirouche, to prove the defectiveness of the press brake. Amada has moved to exclude all expert testimony offered by Dr. Amirouche under Rule 702 and the requirements of Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid.702.

Under Daubert, the Court must determine whether the reasoning and methodology underlying the proposed expert's testimony is valid. Peitzmeier v. Hennessey Indus., Inc., 97F.3d 293, 297 (8th Cir. 1996). In making this inquiry, Daubert offers four non-exclusive factors: (1) whether the concept has been

tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community. Daubert, 509 U.S. at 593-95.

Dr. Amirouche fails the Rule 702 and Daubert requirements for admissibility of expert testimony. First, Dr. Amirouche's testimony is unreliable. It is not based on sufficient facts and data. Dr. Amirouche has virtually no experience with press brakes, other than his participation in a forty-minute discussion of press brakes during a two-day conference, and the limited experience he had during his undergraduate studies approximately 25 years ago. Although he reviewed some information about press brakes on the internet, none of that information provided a basis for his opinions.

Second, Dr. Amirouche has not designed or tested the devices he claims would have prevented Mr. Shaffer's accident. He has not even sketched any of these possible alternative designs. He has no knowledge as to whether any of his proposals would work or would interfere with the normal operation of the press brake. Similarly, Amirouche offers no quantifiable evidence to support his theory that excessive "travel" in the treadle bar caused the accident. He has simple made on-site measurements that he recorded in a one-page hand written note, purporting to show the "travel" but not trying that "travel" to any cause of the accident.

Third, there has been no peer review of Dr. Amirouche's theories of alternative design. Because there has been no testing of the

alternative designs, we also do not know the potential rate of error. Finally, there is no evidence of the general acceptance of Amirouche's abstract theory that his laundry list of devices would have prevented the accident.

Shaffer claims Dr. Amirouche is similar to the expert who was admitted in Lauzon v. Senco Prods., 270 F.3d 681 (8th Cir. 2001), which involved an allegedly defective nail gun. In Lauzon, the expert conducted various scientific tests in arriving at his opinion that the nail gun was defective – he measured the trigger force of the gun and the nail speed from various distances, conducted a pendulum test to measure recoil forces, and recreated the roof where the accident occurred. Id. At 688-89. Moreover, the plaintiff's proffered expert published an article about the allegedly defective nail gun in the Journal of the National Academy of Forensic Engineers. Id. At 690. He also consulted two specific articles regarding nail gun injuries and the alternative design he was advocating.

Dr. Amirouche stands in stark contrast to the controverted expert in Lauzon. The extent of his examination of the actual machine, as well as the information gathered from Newco employees regarding the normal operation of the press brake during his only visit to the Newco plant, covered only one handwritten page of notes. It is estimated that this visit to the Newco plant took only ninety minutes.

Amirouche lacks even a comprehensive understanding of how the press brake at issue works. For instance, Amirouche does not know where the press brake's "on/off" switch is

located. He does not know what mechanism is actuated by use of the treadle bar – which he claims is defectively designed and unreasonable dangerous. Amirouche Depo. At 246 (I did not really look at that machine in particular, finding out whether it's a gear system or hydraulic system, electrical system, motor of some sort that actually keep – you know, moves it, you know."). Dr. Amirouche admits that the only literature he consulted specific to the press brake at issue in this case was the operator's manual and the parts list. He did not test his theories to see whether the general safety measures he proposes would actually work on the RG5020LD without altering the purpose for which the machine is used (bending coffee pot component parts). Moreover, unlike the Lauzon expert, Dr. Amirouche made no attempt to either quantify his findings of excessive "travel" in the treadle bar, like measuring the force required to activate the machine. Nor has he subjected his "research" – which was almost exclusively documents he gathered from the Internet solely for the purpose of this litigation – and assorted theories of alternative design to peer review. The fact that Dr. Amirouche is a professor and an engineer does not grant him license to label as "scientific" unsubstantiated or overly broad opinions.

Despite Shaffer's protestations, Dr. Amirouche is similar to the experts in several cases that were mentioned in Lauzon. For instance, in Jarequi v. Carter Manuf. Co., Inc., 173 F.3d 1076, 1080 (8th Cir. 1999), the Eighth Circuit affirmed the exclusion of the plaintiff's proffered expert who attempted to testify that the

corn head on a combine was defective because it lacked "awareness barriers" that warned of the hazard zone where the gathering chains of the combine emerged from the snout of the machine. The expert did not study the feasibility of this idea, much less design or test it. Id. He was unaware of any study regarding the effectiveness of such a barrier or of any manufacturer incorporating such an idea into a finished product. Id. As with Dr. Amirouche's proposals, the Jarequi expert did not "construct or ever draw the suggested device, much less test its utility as a safety device or its compatibility with the corn head's proper function." Id. At 1084. (8th Cir. 1996), the district court excluded the proffered testimony of an expert who wished to testify that a tire changing machine was unreasonably dangerous. The proposed expert opined that the tire changing machine acted as a "launch pad" for an overinflated tire, an effect that he said could be reduced with several changes he proposed. Id. However, like Dr. Amirouche, the expert had neither designed nor tested the proposed design for safety or utility although (unlike Dr. Amirouche) he had drawn some rough sketches. Id. These sketched were not adapted into engineering drawings, much less actual prototypes. Id. Again, similar to Dr. Amirouche's proposed changes, none of the Peitzmeier expert's proposed changes were subject to peer review. Id. The Eighth Circuit affirmed the district court's decision to exclude the expert's testimony. Id. At 298. See also Dancy v. Hyster Co., 127F.3d 649 (8th Cir. 1999) (Affirming exclusion of expert testimony that forklift used by

defendant should have a guard where expert had not tested his theory or designed the alternative guard).

Because I find that the proposed testimony of Dr. Farid Amirouche does not satisfy the requirements of Rule 702 and cannot survive a Daubert challenge, I will grant Amada' motion in limine and exclude his testimony.

III. Summary Judgment Motion

In determining whether summary judgment should issue, the Court views the facts and inferences from the facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P.56©; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material facts exist. Fed.R.Civ.P.56(e). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

Missouri law requires Shaffer to prove the following elements: (1) Amada America sold the press brake in the course of its business; (2) the press brake was in a defective condition that

made it unreasonably dangerous when put to a reasonably anticipated use; (3) the press brake was used in a manner reasonably anticipated; and (4) Shaffer was damaged by the defective condition that existed when the product was sold. Rauscher v. General Motors, 905S.W.2d 158, 160 (Mo. Ct. App. 1995). Amada America has shown that the record is devoid of any admissible evidence as to the second element – that the press brake was in a defective condition that made it unreasonably dangerous to operate. Because of this complete failure of proof of an essential element, Amada is entitled to judgment as a matter of law.

Plaintiff has filed depositions of Amada Engineering employees James Donald Rush, John Porco, and Themis Alexopoulos. These additional filings do not establish the defectiveness or unreasonable dangerousness of the RG5020LD press brake that Mr. Shaffer was repairing the day he was injured. The Alexopoulos and Rush depositions do establish that Amada offered some extra guarding devices at the time the RG5020LD was sold to Newco, but it does not follow from this evidence that the RG5020LD is defective without these devices or that they would have prevented the accident that occurred here.

The law is not so rigid as to require a manufacturer to sell only those products equipped with every available safety device. Linegar v. Armour of America, Inc., 909 F2d 1150, 1154 (8th Cir. 1990). And the absence of an available safety feature does not, by itself, mean a product is defective. Missouri law, instead, "demands that we focus our efforts on

defects that are unreasonably dangerous." Sandage v. Bankhead Enterp., Inc., 177 F.3d 670, 673 (8th Cir. 1999).

This is not a case like Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599 (Mo. Ct. App. 1984), where the circumstantial evidence presented would allow a jury to find defect without expert testimony. In Patterson, a baby bottle exploded, sending shards of glass that severed tendons in a mother's hand. Id. At 601. This case is not so simple.

This case involves a complex piece of industrial machinery. Because a finding of defect cannot rest on conjecture or speculation, Crump v. MacNaught P.T.Y., Ltd., 743 S.W.2d 532, 534 (Mo.Ct.App. 1987), Shaffer needs competent expert testimony to establish that this press brake is defective and unreasonably dangerous. Without expert testimony, we are left with evidence of an accident. The fact that an accident happened, standing alone, does not establish a case of product defect. Winters v. Sears, Roebuck, & Co., 554 S.W.2d 565, 571 (Mo.Ct.App. 1977).

Plaintiff's remaining expert, Dr. Miranda Savage, does not provide sufficient expert testimony regarding the allegedly defective condition of the RG5020LD press brake to save the case from summary judgment. Dr. Savage only opines that an OSHA standard was violated when Shaffer, flowing Amada Engineering's procedure, attempted to fix the press brake. But even if the OSHA regulations provide the standard of care for workers such as Mr. Shaffer, Savage's testimony is not helpful to the essential inquiry in this case – whether the product was in a

defective condition when put to a reasonably anticipated use. Savage's testimony regarding Shaffer's working conditions is therefore insufficient to overcome Amada's motion for summary judgment.

V. Conclusion

The opinions and testimony of Dr. Farid Amirouche do not meet the requirements for expert testimony, as set forth in Fed. R .Evid. 702 and Daubert. Without this testimony, there is no evidence that plaintiff can introduce that could prove that the Amada RF5020LD is defective and unreasonably dangerous, and I will therefore grant Amada's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [#31-1] is granted;

IT IS FURTHER ORDERED that Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouchce [#37-1] is granted;

IT IS FURTHER ORDERED that all other pending motions are denied as moot.

A separate judgment in accord with this Memorandum and Order is entered this same date.

Dated this 6th day of January, 2003.

Catherine D. Perry
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

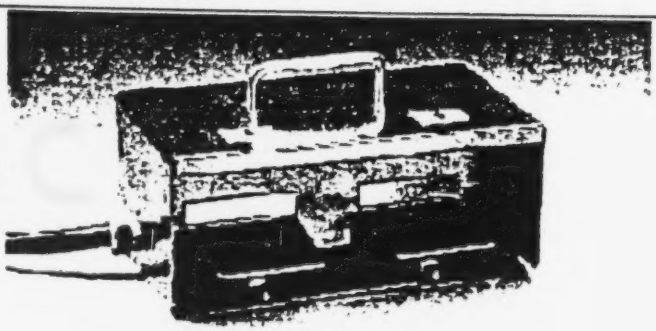
JUDGMENT

In accordance with the Memorandum and Order entered this same date, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that judgment is entered in favor of defendant, that the plaintiff take nothing, that the action be dismissed on the merits, and that defendant recover of plaintiff its costs of this action.

Dated this 6th day of January, 2003

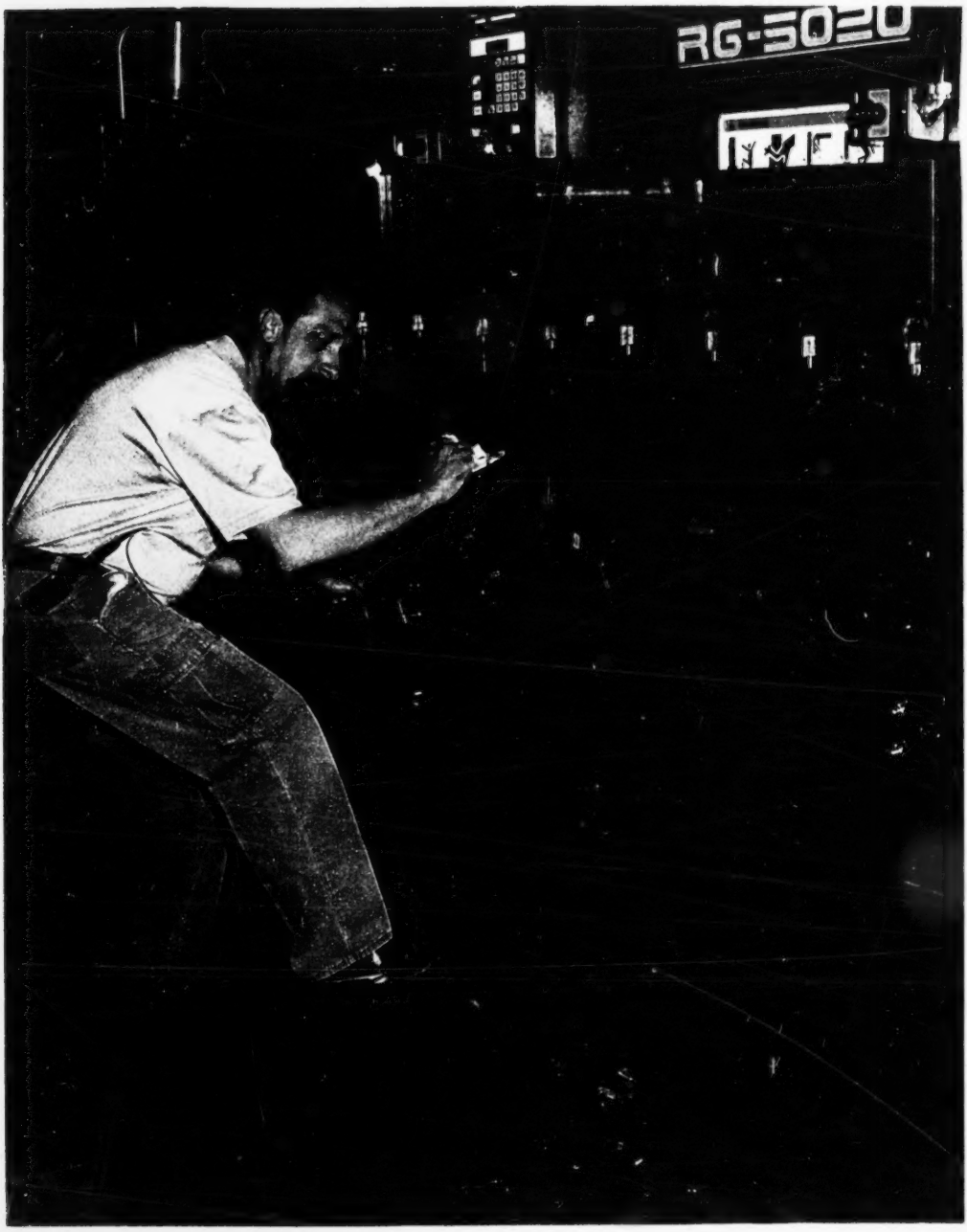
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CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

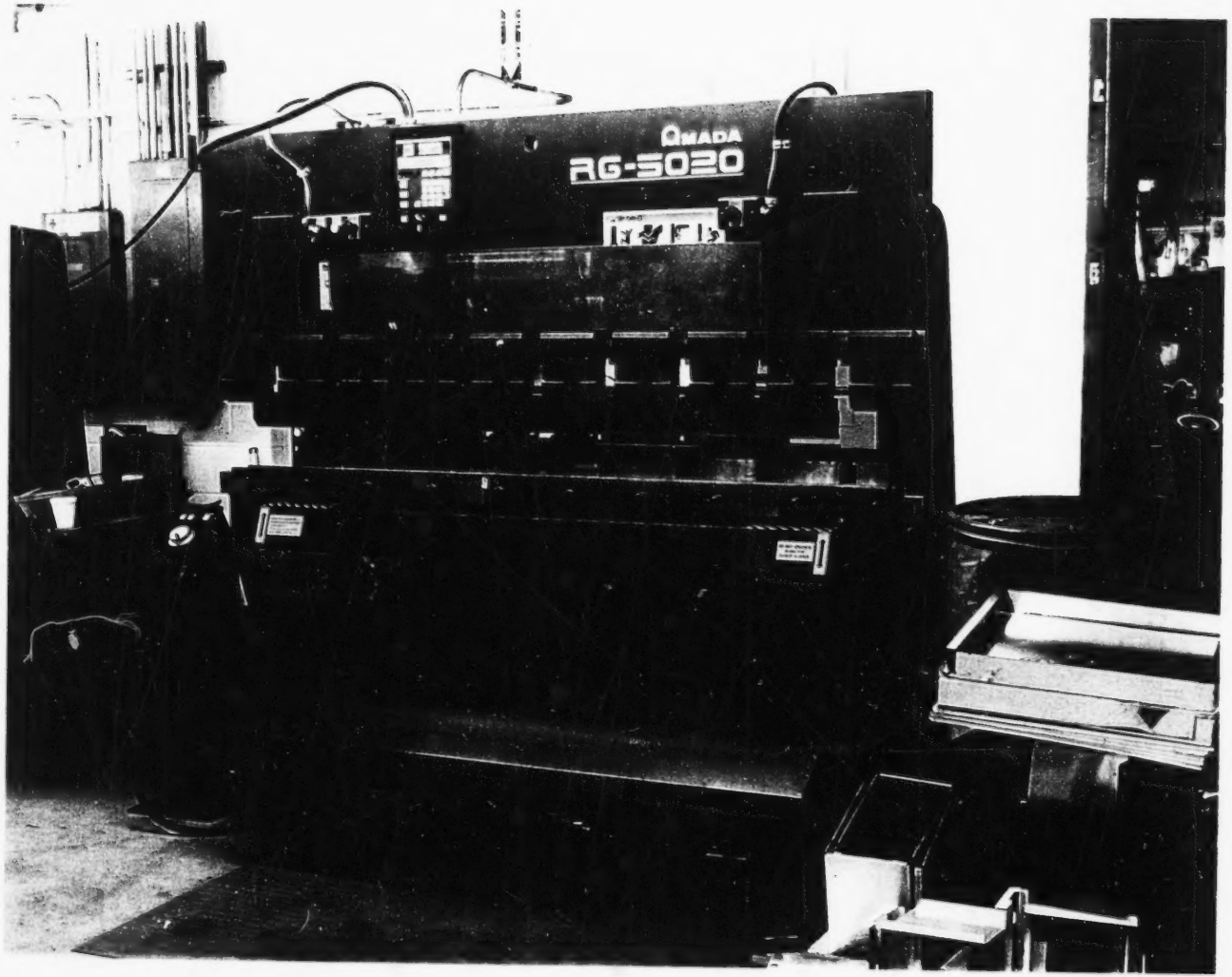
Foot Switches



Amada Engineering stocks a wide array of foot for all press brake models such as RG, FBD and HFB These include retrofit switches which will add versatility to your press brake for staging or Dual Operator operations. Reduce Operator fatigue while increasing safety of the bending operation.

- Locate a Sales Engineer


RG-5020


AMADA
RG-5020

Amada Engineering
& Service Co., Inc.



Retrofit Products

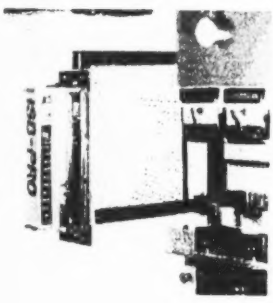
Press Brake Safety

Dual Palm Buttons



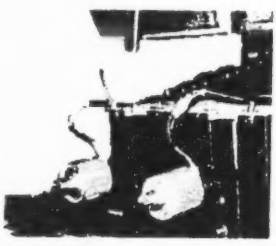
Put safety in the palm of your hand. This two-hands controlled protection system reduces accidents associated with bending operations. In addition it satisfies all OSHA requirements for point of operation guarding. AESI's Dual Palm Buttons allow full ram motion when bending any size part.

ISB Programmable Light Curtains



The ISB Programmable Beam blank-out light curtain is our unique safety solution for Amada press brake guarding. ISB light curtains provide optimum safety with minimum production interruption. The intelligent control system, not the operator, allows the workpiece profile to determine which beams are activated. Safety no longer has to come at the expense of productivity.

Electromagnetic Fingers



These electromagnets are designed to hold the work being formed in the press brake while getting the operator's hands away from the "point of operation" during the forming cycle. A new control feature permits